DESIGNING TRIAL AVOIDANCE PROCEDURES FOR POST-CONFLICT, CIVIL LAW COUNTRIES: IS GERMAN ABSPRACHE AN APPROPRIATE MODEL FOR EFFICIENT CRIMINAL JUSTICE IN AFGHANISTAN?

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I. INTRODUCTION

In Afghanistan, the persistence of several problems has caused inefficiency in the criminal procedure. These problems range from institutional, to lack of professional personnel, to prolonged procedure, and have prevented Afghan criminal procedure from adequately addressing
A noticeable problem is the Afghan Criminal Procedure Code’s failure to deal with court backlogs and trial length. In order to reach a final verdict, cases go through time consuming procedures that lengthen the case disposal procedure and thus make the trial costly to the government and the defendant. This is a typical problem for post-conflict countries suffering from inefficient systems of criminal procedure. Notwithstanding the fact that many reforms focus on the eradication of these problems, the criminal justice systems of countries such as Afghanistan have shown little development in establishing case disposing procedures.

Afghanistan recently adopted a Criminal Procedure Code which has solved many of the problems that existed before its enactment. However, it fails to adequately address court backlogs and unnecessarily lengthy trials. This paper argues that these backlogs persist because of the absence of adequate trial avoidance procedures in the new Code and that the problem has been intensified by the dissatisfaction of the parties about trial outcomes.

To increase efficiency, this paper suggests that Afghanistan could adopt German *Achtschriften* as a case disposing procedure entailing party consents while keeping the *ex proprio moto* investigation obligation (the truth finding obligation) of courts intact. This observation and recommendation could also be valuable to other post-conflict civil law countries looking for solutions to delay and backlogs in their own criminal justice systems.

The establishment of such an institution promises to harmonize the criminal procedure with the general tendency to base procedural institutions on “procedural economy.” While once deemed unfavorable, these instruments have recently gained popularity in reform efforts to reduce trial length and cost. For example, several European countries have begun to establish discretionary powers and out-of-court procedures to increase the

2. The issue of backlogged courts is not new and has been a topic of discussion even before the 2014 Code. Ahmad Shah, *Afghanistan: A Brief Trial, A Longy Sentence*, NFP (May 17, 2012), www.nfp.org/2012/05/17/a-brief-trial-a-longy-sentence.
5. Id.
efficiency of their criminal procedures. And with this same goal, even international criminal tribunals have instituted trial avoidance procedures.

One of the important benefits of trial avoidance procedures like Absprachen is that they yield different benefits to the parties. Absprachen provides the defendant with an opportunity to interact with the court in a “harmonious atmosphere,” and it accords that defendant a degree of control having psychological benefits. The prosecution’s interest in obtaining a conviction is also protected. In addition, these procedures save courts’ time and significantly reduce their caseload; thus, they save the public money, putting less stress on the “public purse.” In sum, they are time and cost efficient.

The second section of the paper will explain the current principles of the criminal procedure in Afghanistan, explaining that the absence of adequate case disposing procedures in the new Code has caused a significant increase in court dockets as well as in the duration of cases. The third section will explain Germany’s history and current practice of Absprachen (negotiated agreements). Subsequently, the fourth section examines the adoption of the negotiated agreements in Afghanistan. This section includes a short description of adjustments that would be needed for negotiated agreements to succeed in the Afghan context, and it anticipates possible criticism and potential challenges to the application of these agreements. The paper concludes by depicting final thoughts and concluding remarks.

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11. Id.


14. Id.
II. CONSENSUAL ELEMENTS IN THE CURRENT CRIMINAL PROCEDURE OF AFGHANISTAN

This section gives an overview of criminal procedure in Afghanistan, discussing consensual elements that exist in the criminal codes, current problems caused by the lack of adequate consensual elements in the criminal procedure, and similarities between the Afghan and the German criminal procedure.

A. General Overview of the Criminal Procedure in Afghanistan

In Afghanistan, criminal procedure rules are mainly found in three codes. These codes are the Criminal Procedure Code, the Law on the Organization and Jurisdiction of the Judiciary Branch of the Islamic Republic of Afghanistan (Law on the Organization of Courts), and the Law of the Structure and Authority of Attorney General Office (Law on the Organization of Prosecution). Of these laws, the Criminal Procedure Code contains the majority of the procedural principles, and it is descriptive and detailed in nature. These principles apply to any party involved in criminal proceedings. In contrast, the Law on the Organization of Courts ordains principles that only bind courts, and the Law on the Organization of Prosecution only applies to the Attorney General Office.

Criminal cases in Afghanistan go through three phases, starting from the detection phase and continuing on to the investigation and adjudication phases. Each of these phases is handled by a specific agency or branch of government. Article 134 of the Constitution gives to the police the responsibility for detecting crimes and to the prosecution the responsibility for investigating and pursuing the case in courts. The Judiciary has been granted the power to adjudicate all disputes by Article 120 of the Constitution. Despite the clear autonomy of each entity in its responsibilities, a system of “checks and balances” has been created to

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14. In this paper, discussions about the criminal procedure only include the formal justice system of Afghanistan, not the informal justice system nor courts established by Taliban. In Afghanistan, the informal justice system, though not formally institutionalized, has proved effective in adjudicating criminal conflicts in some areas. These systems called Jirga mainly base their decisions on tradition in both substantive and procedural part. In courts established by Taliban, though, judges, in the presence of the person in charge of adjudication (mostly the commander), the tradition, and in some parts Islamic law are determinant.


16. This article reads, “The authority of the judicial organ shall include consideration of all cases that by real or corporal persons, including the state, as plaintiffs or defendants, before the court in accordance with the provisions of the law.” THE CONSTITUTION OF AFGHANISTAN 1383 (2004), art. 120 (unofficial translation).
prevent misuses of power by these entities. The Criminal Procedure Code authorizes the prosecution to be present during the detection process and to supervise activities of the police in the preliminary stages of the case.\textsuperscript{17}

Likewise, if documents submitted by the police are incomplete or contain ambiguities, the prosecutor can reject admitted files or can ask the police to carry out further investigations.\textsuperscript{18} Besides this, the Law on the Organization of Prosecution asserts that the prosecution is obliged to insure fair application of related laws by detective and investigative entities.\textsuperscript{19} The prosecution’s activities, however, are supervised by courts. This supervision is carried out in different ways. For instance, courts can ask prosecutors for further investigation and clarification.\textsuperscript{20} Similarly, they retain the power to stamp on some of the prosecutors’ decisions during the investigation phase, such as extension of a suspect’s detention period.\textsuperscript{21}

As mentioned above, the criminal proceeding starts with the detection phase, which is carried out by the police.\textsuperscript{22} When the police learn about a crime, they are responsible for collecting the evidence that proves the occurrence of the crime.\textsuperscript{23} Once proven, the police can proceed to arrest the suspect and further the interrogations. However, except in flagrante delicto, the power to arrest is confined within certain circumstances specified by the law.\textsuperscript{24} If these circumstances do exist and the suspect is in custody, the police are obligated to complete the preliminary investigation and interrogations within seventy-two hours and refer the case to the prosecution;\textsuperscript{25} otherwise, the suspect will be released and the police can continue their proceedings.

When a case is referred to the prosecution, the second phase begins. The Attorney General Office (Loy Saranwali) is the only entity authorized to investigate criminal cases.\textsuperscript{26} Although under the administrative supervision of the Executive branch, the Attorney General Office is fully independent in its activities.\textsuperscript{27} The structure of the Attorney General Office is completely

\textsuperscript{17} Qanuni Ejaati Jazai [Criminal Procedure Code] Kabul 1393 [2014] art. 59 (Afgh.).
\textsuperscript{18} Qanuni Tashkil Wa Salahiati Loy Saranwali [Law on the Organization and Authority of General Attorney Office] Kabul 1392 [2013], art. 13(1)(3) (Afgh.).
\textsuperscript{19} Id. art. 15.
\textsuperscript{20} CRIMINAL PROCEDURE CODE Kabul 1393 [2014] art. 177 (Afgh.).
\textsuperscript{21} CRIMINAL PROCEDURE CODE Kabul 1393 [2014] art. 100 (Afgh.); LAW ON THE ORGANIZATION AND AUTHORITY OF GENERAL ATTORNEY OFFICE Kabul 1392 [2013], art. 13(1)(7).
\textsuperscript{22} CRIMINAL PROCEDURE CODE Kabul 1393 [2014] art. 80(1) (Afgh.).
\textsuperscript{23} Id. art. 80(2).
\textsuperscript{24} Id. art. 81.
\textsuperscript{25} Id. art. 87.
\textsuperscript{26} See Erin Cregan & Clare J. Hatfield, Creeping Adversarialism in Counterterrorist States, 29 CONN. J. INT’L L. 1, 39 (2013).
\textsuperscript{27} THE CONSTITUTION OF AFGHANISTAN 1383 [2003], art 116 (unofficial translation).
parallel to that of the courts.28 In other words, following the judiciary branch’s structure, the Attorney General Office also has three department levels, the primary prosecution (Sarawuli Ebdakayah), the appellate prosecution (Sarawuli Estayaq), and the Supreme Court prosecution (Sarawuli Tameci).29 Each of these levels pursues cases in their equivalent court and has the same structure and divisions as their equivalent courts do.30 The investigation phase is accomplished by two prosecutors, the investigative prosecutor (Sarawuli Tahayiq) and the trial prosecutor (Sarawuli Taqbiq Qasaqaq).31 Investigations are carried out by the former one. When the investigation is completed, the investigative prosecutor prepares the letter of charge sheet (Edhummanah) and refers the case to the prosecutor who will then file the case to the court and pursue it thereafter.32 If the submitted documents have gaps or ambiguities, or if they are incomplete, the trial prosecutor can ask for further clarification and investigation or reject to accept the file.33

The adjudication phase begins when the indictment (Sorati dawla)34 is filed to the court. In Afghanistan, the Judiciary is the only entity authorized to adjudicate conflicts.35 By the same token, specific courts and divisions within the Judiciary structure are competent to adjudicate criminal cases.36 The Judiciary is composed of three levels of courts.37 The first level consists of primary courts.38 These courts constitute the vast majority of the judicial branch.39 Every province has one criminal primary court in the center of the

28. Id art 134.
30. See, QAMSI TEBILE, WA SALAMATI LOY SARAWULI (LAW ON THE ORGANIZATION AND AUTHORITY OF GENERAL ATTORNEY OFFICE) KABUL 1392 [2013], arts. 15, 17, 26 (Alg.).
31. See Id. arts. 20, 26.
32. CRIMINAL PROCEDURE CODE KABUL 1392 [2013] art. 163, 167 (Alg.).
33. Id. art. 168.
34. The letter of charge sheet (Edhummanah) and Sorati dawla are different official letters. The first is prepared by the investigative prosecutor and submitted to the Trial prosecutor indicating that there is enough evidence incriminating the suspect. In contrast, Sorati dawla is a letter submitted to the court by the Trial prosecutor by which he/she specifies the crimes, introduces the evidence, and asks for punishment. Id.
36. CRIMINAL PROCEDURE CODE KABUL 1392 [2013] art. 164, 170 (Alg.).
38. See LAW ON THE ORGANIZATION AND AUTHORITY OF GENERAL ATTORNEY OFFICE KABUL 1392 [2013], arts. 42-45 (Alg.).
39. See Id.
province and a district primary court in each district.\(^{40}\) It is worth noting that if the accused is in custody, the primary court has to adjudicate the case within thirty days; otherwise, the suspect will be released and the court can resume its proceedings.\(^ {41}\)

Within twenty days after the court’s declaration of the judgment,\(^ {42}\) parties have the right to appeal the decision on grounds of error in law or based on factual error.\(^ {43}\) None of the parties can waive his/her right to appeal in any case.\(^ {44}\) However, there exist certain circumstances under which parties are not allowed to appeal.\(^ {45}\) The petition to appeal can be filed in both the primary court that rendered the judgment or the competent appellate court, and the petition can be oral or written.\(^ {46}\)

Appellate courts are the second level of the judiciary constituents.\(^ {47}\) Each province has one appellate court,\(^ {48}\) except Kabul.\(^ {49}\) Each appellate court has been divided into five divisions.\(^ {50}\) Of them, two deal with the criminal cases, the Criminal Division and the Public Security Division. Each division is composed of at most six judges, and a panel of three judges reviews the case.\(^ {51}\) Decisions of the appellate courts can be reviewed only for error of law, and appeals to the Supreme Court must be filed within thirty days after the declaration of the appellate court’s judgment.\(^ {52}\)

The Supreme Court of Afghanistan is the highest adjudicative entity in the country.\(^ {53}\) It is called “the court of law” because it only reviews cases for

\(^{40}\) Id. art. 61–62, 68.
\(^{41}\) CRIMINAL PROCEDURE CODE Kabul 1393 [2014] art. 101 (Afg.).
\(^{42}\) Id. art. 253(2).
\(^{43}\) Id. art. 246.
\(^{44}\) Id.
\(^{45}\) LAW ON THE ORGANIZATION AND AUTHORITY OF GENERAL ATTORNEY OFFICE Kabul 1392 [2013], art. 72(4) (Afg.).
\(^{46}\) CRIMINAL PROCEDURE CODE Kabul 1393 [2014] art. 246, 252 (Afg.).
\(^{47}\) Id.
\(^{48}\) LAW ON THE ORGANIZATION AND AUTHORITY OF GENERAL ATTORNEY OFFICE Kabul 1392 [2013], art. 52 (Afg.).
\(^{49}\) Since the population in Kabul is boosting, and there is overwhelming outburst of cases, Kabul has been divided into four judicial districts and each district has its own appellate court. Added to this is the appellate level of special courts. *Editor’s Note: From author’s personal knowledge. See also Faiz Ahmed, Judicial Reform In Afghanistan: A Case Study in the New Criminal Procedure Code, 29 WASH. & LEE J. COMP. L. 1, 101 (2005).
\(^{50}\) LAW ON THE ORGANIZATION AND AUTHORITY OF GENERAL ATTORNEY OFFICE Kabul 1392 [2013], art. 53 (Afg.).
\(^{51}\) Id. art. 10, 53.
\(^{52}\) CRIMINAL PROCEDURE CODE Kabul 1393 [2014] art. 270, 273(2) (Afg.).
\(^{53}\) THE CONSTITUTION OF AFGHANISTAN 1383 [2003], art 116 (unofficial translation); LAW ON THE ORGANIZATION AND AUTHORITY OF GENERAL ATTORNEY OFFICE Kabul 1392 [2013], art. 23
error of law. It is composed of nine Justices, nominated by the President and thereafter elected by the House of Representatives, and councilors. The Supreme Court has five divisions, each competent to review special subject matter cases under its jurisdiction. Of these divisions, three have subject matter jurisdiction over criminal cases: the Criminal Division, the Public Security Division, and the Martial, Military Crimes, and Crimes against Internal and External Security Division. Unlike the United States Supreme Court, the highest court of Afghanistan does not have a discretionary power to refrain from entertaining cases appealed to it; except for petty offenses, the Supreme Court accepts any case appealed on the matter of law.

In addition to these courts, there are special courts authorized to adjudicate counter narcotics, anti-corruption, and juvenile criminal cases, at both the primary and appellate level. They also have a parallel specialized investigative and trial prosecution department. The Supreme Court reviews their decisions for errors of law.

Notably, criminal cases do not end with the final decision of the Supreme Court. Under certain circumstances, parties can ask the High Council of the Supreme Court to revise any final decision, even a decision of the Supreme Court. If within three months after a decision's finality, new exonerating evidence surfaces in a criminal case, both the prosecutor and the defendant can ask the Council to revise (Ta'dil Nazer) final decisions.

(Explaning that Afghanistan follows a centralized judiciary system. The highest entity in the judicial area is the Supreme Court. There exists no other constitutional or administrative equivalent court to it.


55. LAW ON THE ORGANIZATION AND AUTHORITY OF GENERAL ATTORNEY OFFICE Kabul 1992 (2013), art 46 (Aq.).

56. Id. art 42.

57. See CRIMINAL PROCEDURE CODE Kabul 1993 (2014) art 7, 720, 727 (Aq.).

58. Id.

59. Id.

60. Id.

61. If parties declare their satisfaction to the lower court's judgment or fail to appeal within the time limits, the judgment of the lower court is finalized and parties cannot appeal; however, the parties can ask for the revision. QUANTLAJA [PRINCIPAL CASES Kabul 1955 (1976) art 198 (Aq.).


63. LAW ON THE ORGANIZATION AND AUTHORITY OF GENERAL ATTORNEY OFFICE Kabul 1992 (2013), art 36 (Aq.).

64. See CRIMINAL PROCEDURE CODE Kabul 1993 (2014) art 311 (Aq.).

65. LAW ON THE ORGANIZATION AND AUTHORITY OF GENERAL ATTORNEY OFFICE Kabul 1992 (2013), art 315 (Aq.).
B. Consensual Elements, and the Trial Avoidance Procedures in Afghanistan

Generally, Afghan criminal procedure lacks consensual elements and trial avoidance procedures. While the new Criminal Procedure Code solves many problems that existed before its coming into force, it fails to relieve the dockets for courts and prosecution. Even more, in coordination with the Law on the Organization of the GAO and the Law on the Organization of Courts, the new Code worsens the situation. This is primarily because Afghanistan has, similar to other civil law countries, subscribed to the principle of mandatory prosecution.66 According to this principle, once the case is brought to the prosecution’s attention and sufficient evidence incriminates the suspect, the prosecution is obligated to prepare the charge sheet and file the case to the court.67 This principle leaves no space for the prosecutor to negotiate with the defendant, nor does it give the prosecutor the authority to dispose of the case.

1. Current Procedures

The Criminal Procedure Code identifies certain circumstances under which the prosecutor can dispose of a case, regardless of incriminating evidence. Article 171 (3) of the Criminal Procedure Code asserts that if the “perpetrator’s culpability and the outcome of the action is insignificant” and there is no public interest in prosecuting the crime, the trial prosecutor “shall” refrain from its prosecution.68 The victim has the right to object to the decision of the prosecutor.69 If the appellate prosecutor confirms the order, the objection must be submitted to the court.70 Likewise, under Article 203 (1) of the Criminal Procedure Code, the court may also dispose a case when the crime is “minor and not punishable.”71

Although the prosecutor has the power to dispose of cases based on public interest, these disposals differ from the so-called diversion procedure.72 “Diversion” orders a substitute for the punishment—for instance, payment to a charity organization; however, the Afghan Criminal

67. See id.
68. CRIMINAL PROCEDURE CODE Kabul 1393 [2014] art. 171(3) (Afgh.) (emphasis added).
69. Id. art. 170.
70. Id.
71. Id. art. 203.
72. Id.
Procedure Code does not authorize the prosecutor to use this approach. This lack of a substitute in Afghan context can make negotiations for the disposition of cases inefficient. However, it is worth noting that there has not been any research indicating whether or not negotiations take place between the prosecutor (and the court) and the defendant at all.

Interestingly, while consensual elements to disposing of cases are considerably insufficient in the investigation phase, the Criminal Procedure Code accords the court with the power to suspend the trial in certain crimes. Article 204 (1) of the Criminal Procedure Code asserts that in obscenity cases, the court can suspend the trial of the defendant for one year provided the accused does not commit any crime within the suspended period. These suspensions are potential circumstances under which the court and the defendant can negotiate terms of the suspension. Likewise, they can provoke negotiation between the prosecutor and the defendant. An easy hypothesis may be agreeing that defendant will confess and the prosecutor will ask for trial suspension. Still, the fact that enough research has not been done on the issue and that the Judiciary’s Report also fails to address it incapacitates us to provide exact details on this trial suspension procedure or at least its happenstance.

In addition to these new institutions introduced by the Criminal Procedure code in 2014, some conventional elements exist that provoke possible consensus between the prosecutor (or the court) and the defendant on further proceedings of the case. Article 52 (2) of the Penal Code asserts that in cases of “alliance in crimes” (Eteinay Dar Jurmi), if a defendant provides information leading to the arrest of his/her other allies (Muafiqin) who were not previously known to the prosecution, the defendant will be exempt from punishment.

In addition, other elements also exist that encourage informal negotiations between the prosecution (or the court) and the defendant. For instance, Article 105 of the Criminal Procedure Code authorizes the prosecution and the court to release the defendant on or without bail regardless of available evidence. Similarly, some other substantive

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73. CRIMINAL PROCEDURE CODE Kabul 1393 [2014] art. 204 (2d). 
74. Obscenity is a crime carrying a sentence of no more than three months and a fine no more than three thousand Afghani. Penal Code Kabul 1355 [1976] art. 26 (2d).
75. CRIMINAL PROCEDURE CODE Kabul 1393 [2014] art. 205 (1d). 
76. Article 49 of the Penal Code provides that alliance in crimes is the regular and continuous joining status of two or more persons in order to commit a crime or in a misdemeanour in an offender or in other smuggling, facilitating or supplementing acts. It should be noted that alliance in crime takes place before the crime has taken place. Once the crime takes place, perpetrators will be punished based on the actual crime as either principal or accomplice. Penal Code Kabul 1355 [1976] art. 49 (4d).
77. Id. art. 52(d).
78. CRIMINAL PROCEDURE CODE, Kabul 1393 [2014] art. 105 (2d).
criminal organic codes contain some elements that give the prosecutor and the defendant some space to negotiate and discuss the outcome of a trial, for instance in drug trafficking crimes. However, these discussions are informal, non-binding, and only occasional. Despite their occurrence in some cases, these negotiations are surrounded by doubt, which in turn leads to their failure or misuse. The most prominent doubt is whether the court approves this agreement.

2. Insufficiency of the Existing Procedures

The preceding section showed that existing consensual elements and trial avoidance procedures in Afghanistan are inadequate to solve the outburst of the courts’ dockets. This conclusion is supported by the growing number of appeals in the country, a result of the legal culture where most cases are appealed to higher courts. In addition, parties keep prolonging trial procedure for various reasons. If the defendant is guilty, he hopes for a lenient punishment; if he is innocent, he aims to receive an exonerating verdict. Prosecutors also have some incentives to disagreeing with the primary or appellate courts’ decisions.

There are two main reasons that parties do not agree to decisions by lower courts—especially primary courts. The first reason is the overwhelming bureaucratic requirement of the Criminal Procedure Code that the prosecutors’ agreement to the courts’ decision requires. Article 23 (2) of the Law on the Organization of GAO provides that the appellate prosecutor has the power to either approve or reject the primary prosecutor agreement to the primary courts judgment. If the appellate prosecutor does not agree, he/she will appeal. However, if the appellate prosecutor also agrees to the primary courts judgment and the alleged crime is felony, article 24 (1) asserts that the case still needs to be sent to the Supreme Court prosecution for further approval. If the Supreme Court prosecutor does not agree, the

79. To the knowledge and experience of the author, these negotiations mostly happen where the prosecutor agrees to ask for lighter punishment if the defendant agrees to give information about the group he or she is working for. Since there is lack of research in this area, it is hard to amount the extent of these agreements.

80. See INT’L CRISIS GRP., REFORMING AFGHANISTAN’S BROKEN JUDICIARY 28 (Nov. 17, 2010).
81. LAW ON THE ORGANIZATION AND AUTHORITY OF GENERAL ATTORNEY OFFICE Kabul 1392 [2013], art. 23(2) (Afg.).
82. According to the article 24 of the Penal Code, felony is a crime carrying death penalty, or incarceration from five year up to twenty years. Felonies do not carry fines. It is also worth noting that the maximum punishment imposed on a crime in Afghanistan is twenty years. PENAL CODE Kabul 1355 [1976] art. 24, 99 (Afg.).
83. LAW ON THE ORGANIZATION AND AUTHORITY OF GENERAL ATTORNEY OFFICE Kabul 1392 [2013], art. 24(1) (Afg.).
case will be sent back to the appellate prosecutor to appeal. Likewise, the
appellate prosecutor’s contentment to the appellate courts’ decision will be
sent to the Supreme Court prosecution. If the Supreme Court prosecutor
does not agree, he/she will appeal. If the Supreme Court prosecutor also
agrees to the appellate prosecutor’s decision and the alleged crime is felony,
the case must be sent to the attorney general. The attorney general or his
trial deputy can disagree with the Supreme Court prosecutor and appeal the
case to the Supreme Court.

The requirement above, at first prolongs the process of finalizing
prosecutors’ satisfaction to lower courts’ judgments. It also causes an
immediate appeal to the extent that lower prosecutors fear that their decisions
will be rejected by one of the higher prosecutors. In addition, prosecutors
are reluctant to be criticized for their unreasonable agreement with the trial
court’s decision (the one rejected by a higher prosecution) insofar as every
prosecutor’s promotion depends on the positive evaluation of his/her
achievements by the head of the department. This reluctance is also
influenced by the fact that prosecutors do not want their personality and
professionalism questioned before co-workers and counterparts with
unreasonable decisions as the decision may appear after being rejected by the
higher prosecutor.

The second reason for the large number of appeals is the punishing
tradition of courts. Unlike some other countries where there might be some
kind of informal custom for specifying the amount of punishment, this
manner has been left completely unbridled in Afghanistan. There is no
specific custom on what can be the fair punishment between what the
prosecutor asks for and what the defendant invokes. This absence of a certain
custom leads to either excess or wantage. Two possibilities do exist. First,
the court orders a punishment closer to what the prosecutor has asked for,
and far from what defendant had sought, so the defendant appeals. Second,
the court’s specified punishment is close to what the defendant had demanded
and far from what the prosecutor had asked for, a case in which the prosecutor
appeals.

The possibilities above are not the most egregious. The fact is that once
one party appeals, the second also appeals for the sake of “risk aversion.”

84. Id. art. 22(2).
85. Id. art. 18(2).
86. Id. art. 28(2).
87. Id.
88. Regina R. Rauhut, Formalization of Plea Bargaining in Germany: Will the New Legislation
89. Jilles W. Putsch, Judicial Participation in Plea Negotiations: A Comparative View,
This is because the Criminal Procedure Code provides that if only the defendant appeals, the appellate court can either mitigate the punishment or confirm the primary court's decision; it cannot increase the punishment. However, if only the prosecutor or both parties appeal, the appellate court can decrease or increase the amount of punishment, confirm the lower court's decision, or overrule it. In light of these options, if the defendant appeals, the prosecutor also appeals; and if the prosecutor appeals, the defendant favors appealing in order to present mitigating factors and reasons. It does not appear rational for the defendant to leave the appellate court be deceived by the prosecutor.

3. The Judiciary Reports

As support for these points about efficiency of courts, this paper analyzes the Supreme Court quarterly reports. These reports include a brief description of the proceedings of all three-level courts in that specific quarter. Since the current Criminal Procedure Code came into force on May 5, 2014, two recent quarterly reports of the Supreme Court will be discussed here. For the sake of comparison, it also discusses two other prior quarterly reports from October 2013 through March 2014.

According to the last two Judiciary reports, 16,387 cases were submitted to the primary courts all over the country during first six months (April-

90. See Folker Bittmann, Consensual Elements in German Criminal Procedural Law, 15 GER. L. J. 15 (2014) (discussing the consensual element in German law).
92. Considering the lack of adequate sources and researches in the area, the author inevitably relied on the Supreme Courts report in this research. These reports are the only available sources for research on cases' statics in different procedural stages. Although these reports have some gaps and inconsistencies, they do not affect the parts this paper has depended on. The author has attempted to avoid depending on those parts of these reports which are unreliable due to inconsistencies and other ambiguities.
94. Id. Notably, the Attorney General's Office reports are not generally available to the public. It has not published them in hard copy nor has it published them electronically (offering them on the official website or otherwise). One of the found copies of its three pages official report of 1392 (April 2013-March 2014) to the President Office is so brief, incomplete and vague that cannot be depended on.
September) of the application of the new Code.95 During that period, those courts decided only 14,717 cases (71% of their dockets).96 Likewise, during these first six months, 11,441 cases were appealed to the appellate courts all over the country.97 This means that nearly 77% of the cases decided by the primary courts during these months were appealed to the appellate courts.98 These newly appealed cases constituted 67% of appellate courts’ dockets.99 The appeal rate was approximately 82% during the six months before the application of the new Code (October 2013–March 2014).100 Likewise, while appellate courts had decided 10,578 cases (62% of their dockets) during the first six months of the application of the new Code,101 6470 cases were appealed to the Supreme Court.102 In light of that number,
approximately 61% of cases decided by the appellate courts were appealed to the Supreme Court. During the last six months before the application of the new Code, the appeals rate to the Supreme Court was approximately 52%. These newly appealed cases constituted 56% of the Supreme Court’s docket. The Supreme Court decided 7083 cases (57% of its docket) during the period.

Notably, the docket clearance rates differ from one court with a specific subject matter jurisdiction to another. For instance, while the Criminal Division of the Supreme Court cleared approximately 87% of its docket, the Martial, Military Crimes, and Crimes against the Internal and External Security Division cleared only 40% of its docket. This number is likely explained by the fact that some of the crimes under the competence of these divisions are cumbersome in nature, such as drug crimes and abduction. Not only is the prosecution unable to investigate them within the time limits, but courts have also been struggling with these crimes. Specifically, the amount of procedures gets overwhelming when these crimes are repeatedly


appealed. For instance, while 3567 (approximately 71% of their dockets)\(^{110}\) cases were decided by the Public Security Divisions\(^{111}\) of primary courts all over the country during the first six months of the application of the new Code,\(^{112}\) 3504 cases (almost all cases decided by the Public Security Divisions of Primary Courts)\(^{113}\) were appealed to the Public Security Divisions of appellate courts.\(^{114}\)

High conviction rate is another catalyst to the outbreak of these appeals.\(^{115}\) Although the exact percentage of conviction rate in Afghanistan is not clear yet, an in-depth analysis of the Judiciary’s reports gives some perspective on it. According to these reports, the conviction rate in first instance courts was approximately 82% during the first six months of the application of the new Code (April-September 2014).\(^{116}\) Likewise, the conviction rate in appellate courts was approximately 84% during this period.\(^{117}\) In contrast, while the conviction rate was approximately 79% in

\(^{110}\) Total dockets of these courts reached approximately 3500 cases. See **The Report of the First Quarter of 2013 (Apr.-June 2014) of Division of the Supreme Court of Islamic Republic of Afghanistan and Court Below it Kandahar 2013** (July-Sept. 2014), 6;

**The Report of the Second Quarter of 2013 (July-Sept. 2014) of Division of the Supreme Court of Islamic Republic of Afghanistan and Court Below it Kandahar 2013** (July-Sept. 2014), 11;

**The Report of the Third Quarter of 2013 (July-Sept. 2014) of Division of the Supreme Court of Islamic Republic of Afghanistan and Court Below it Kandahar 2013** (July-Sept. 2014), 14;


\(^{111}\) Public Security Division handles cases concerning the public security and public interest such as odious, deception, small corruption cases, and small drug crimes. **Law on the Organization and Authority of General Attorney Office Kandahar 2013**, art. 8(2)(a) (Afghanistan).

\(^{112}\) **The Report of the First Quarter of 2013 (Apr.-June 2014) of Division of the Supreme Court of Islamic Republic of Afghanistan and Court Below it Kandahar 2013** (July-Sept. 2014), 6;

**The Report of the Second Quarter of 2013 (July-Sept. 2014) of Division of the Supreme Court of Islamic Republic of Afghanistan and Court Below it Kandahar 2013** (July-Sept. 2014), 11;

**The Report of the Third Quarter of 2013 (July-Sept. 2014) of Division of the Supreme Court of Islamic Republic of Afghanistan and Court Below it Kandahar 2013** (July-Sept. 2014), 14;


\(^{113}\) **The Report of the First Quarter of 2013 (Apr.-June 2014) of Division of the Supreme Court of Islamic Republic of Afghanistan and Court Below it Kandahar 2013** (July-Sept. 2014), 25;

**The Report of the Second Quarter of 2013 (July-Sept. 2014) of Division of the Supreme Court of Islamic Republic of Afghanistan and Court Below it Kandahar 2013** (July-Sept. 2014), 42;

**The Report of the Third Quarter of 2013 (July-Sept. 2014) of Division of the Supreme Court of Islamic Republic of Afghanistan and Court Below it Kandahar 2013** (July-Sept. 2014), 33;


\(^{114}\) **See generally** **Indian Hash, Afghanistan’s U.S.-Funded Counter-Narcotics Tribunal Court Nearly A Debacle**, **Radio Free Asia,** (June 16, 2012, 12:11 AM),

http://www.buffingtonlaw.com/2012/06/afghanistan-counter-narcotics-tribunal-courts-nearly-a-debacle/

\(^{115}\) **See The Report of the First Quarter of 2013 (Apr.-June 2014) of Division of the Supreme Court of Islamic Republic of Afghanistan and Court Below it Kandahar 2013** (July-Sept. 2014), 25;

**The Report of the Second Quarter of 2013 (July-Sept. 2014) of Division of the Supreme Court of Islamic Republic of Afghanistan and Court Below it Kandahar 2013** (July-Sept. 2014), 42;

**The Report of the Third Quarter of 2013 (July-Sept. 2014) of Division of the Supreme Court of Islamic Republic of Afghanistan and Court Below it Kandahar 2013** (July-Sept. 2014), 33;

**The Report of the Fourth Quarter of 2013 (July-Sept. 2014) of Division of the Supreme Court of Islamic Republic of Afghanistan and Court Below it Kandahar 2013** (July-Sept. 2014), 75. These convictions rates have been calculated by the author. In order to obtain estimates these rates courts with the most consistent and comprehensive data and dockets were chosen, namely the Criminal Division, the Public Security Division, the Military Division, and the Courts Against Internal and External Security Division of the primary courts. These rates are the results of the total reported convictions and acquittals of each of the above mentioned courts. Add to this, the data does not give us the exact conviction rate, but the exact rate does not significantly differ from what this data reveals.

primary courts during last six months before the application of the new Code (October 2013-March 2014),\textsuperscript{118} it reached about 83% in appellate courts.\textsuperscript{119} These rates clearly indicate the potential of appeals by defendants. Almost all convicted defendants appeal to higher courts. Considering Articles 260 and 261 of the Law on Organization of AGO,\textsuperscript{120} once the defendant appeals, the prosecutor follows the path immediately. Sometimes, this situation is most similar to the so-called prisoner’s dilemma for both parties.\textsuperscript{121}

Afghanistan is not the only country dealing with these docket. Most of the recent changes in the criminal procedures of other civil law countries have also been inspired by the fact that their traditional institutions were unable to solve problems created by different factors such as increases in the amount of crimes and the emergence of complicated crimes. These countries have been able to establish (either invent or transplant) some institutions to confront these problems. The next section discusses some of these institutions and tries to find a suitable solution to this problem in Afghanistan.

4. Possible Solutions

Generally, unlike their common law counterparts, civil law countries do not accord prosecutors with enough discretion to dispose of cases;\textsuperscript{122} the principle of prosecutorial discretion is barely known to these countries. This peculiarity stems from two aspects of criminal procedure in civil law countries: (1) the principle of legality, which in turn results to the mandatory

\textsuperscript{118} See The Report of the Second Quarter of 1393 (July–Sept. 2014) of Divisions of the Supreme Court of Islamic Republic of Afghanistan and Court Below It Kabul 1393 [2014] 6–9, 12–13. Courts chosen for this rate among appellate courts were the Criminal Division, the Public Security Division, the Crime against Internal and External Security Division of appellate courts, and the Anti-corruption Appellate Courts.


\textsuperscript{120} As mentioned before, article 260 asserts that if only the prosecutor appeals, or if both the prosecutor and the defendant appeal, the appellate court has the power to decrease or to increase the punishment specified by the lower court. In contrast, article 261 stipulates that if the defendant is a joint defendant, the court can either confirm the lower court’s judgment or it can decrease the punishment specified by the lower court, it cannot increase it. \textit{Criminal Procedure Code} Kabul 1393 [2014] art. 260–61 (Alp.).

\textsuperscript{121} Id.

prosecution principle, in some countries, and (2) the existence of investigating magistrates in others. It should not be assumed, however, that the principle of expediency is also not valued by these countries. On certain occasions, even in civil law countries, the law identifies conditions under which a prosecutor has discretion to dispose of cases. It should be noted, nevertheless, that these countries differ significantly as to the extent that they use the expediency principle. Some countries, such as France, accord the prosecutor with a fair amount of autonomy in deciding which case should be filed and which should not, while others do not intend to make the prosecutor a "Jack of all trades." In the latter ones, judges are involved one way or the other in disposing procedures. Regardless of how much power the prosecutor has been accorded, these procedures are used as either trial or at least full trial avoidance procedures. The following discussion elaborates on some of them.

In civil law countries, one of these discretionary procedures to avoid the trial completely is the so-called diversion or "public interest drop" where the prosecutor refrains from filing the case in exchange for certain conditions imposed on the defendant, which vary from restitution to different types of payments, to mandatory treatments.

For instance in Germany, if the committed crime is a misdemeanor carrying a sentence of less than one year, and there is no public interest in following the case, both the judge and the prosecutor have the discretion to dismiss it. This is applicable on both absolute and relative petty crimes. While the former gives the prosecutor unconditional discretion, a prosecutor’s decision will depend on the court’s approval in the latter one. In these cases, the defendant will be held to do some particular actions such as

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123. Id at 1432.
124. Id at 1430.
125. Id, supra note 6, at 6.
127. Id, supra note 6, at 6.
128. Id at 9.
129. See, e.g., Lena & Wade, supra note 122, at 1455-61; Thomas, supra note 6, at 355-35.
130. Thomas, supra note 6, at 14.
131. For example, it is a so-called "Lucrative Elements in German Criminal Procedural Law, 11 Crim. L.J. 13 (2014)" (discussing the constitutional element in German law).
132. Rauh, supra note 88, at 106.
133. Rauh, supra note 131, at 17.
134. See the article by Basnight, supra note 3, at 87. [Note: The page number is not visible in the image.]
as paying a specific sum of money to a charity organization in exchange.\textsuperscript{135} Notwithstanding disposing of the case, the action will be recorded in the crime record sheet of the person.\textsuperscript{136}

A penal order is another procedure that is used to avoid trial in some civil law countries. A penal order gives the prosecutor the authority to dispose of the cases after the court’s confirmation and before the case is filed.\textsuperscript{137} For instance, in Germany, in accordance with the section 407 of the German Code of Criminal Procedure (StPO), a prosecutor can ask the court a specific amount punishment, mostly a fine or probation,\textsuperscript{138} to be imposed on the defendant without a trial being held.\textsuperscript{139} In general, penal orders are imposed in cases of flagrant delicto, or in cases with solid evidence, or sometimes in cases where the defendant has already confessed.\textsuperscript{140} After the court’s acceptance of the prosecutor’s suggestion, if the defendant does not appeal to the penal order during the specific amount of time defined by law, the order becomes final and the trial will not be held.\textsuperscript{141} It should be noted, though, that the order will have the status of criminal judgment.\textsuperscript{142}

Negotiated agreements, which do not avoid the trial completely but do avoid full trial, are another procedure used in some civil law countries.\textsuperscript{143} In these agreements, after an abbreviated trial hearing with judicial participation in some countries such as Germany and judicial neutrality in others such as Italy, the prosecution and the defendant agree on specific waiver of the rights by the defendant in exchange for certain concession on the prosecution’s part.\textsuperscript{144} This procedure, compared to others, is mostly based on the consensus and satisfaction of parties, the prosecution and the defendant, before the trial. This procedure will be discussed more fully in Section III.

There are also other procedures to avoid full-blown trials. Some instances can be the German Beschleunigtes Verfahren\textsuperscript{145} and the French Comparution immédiate,\textsuperscript{146} which give the prosecutor the authority to

\textsuperscript{135} See, e.g., Rauzloh, supra note 88, at 305; Thomas Weigend & Jenia L. Turner, The Constitutionality of Negotiated Criminal Judgments in Germany, 15 GER. L. J. 81, 83–84 (2014).

\textsuperscript{136} See Luna & Wade, supra note 122, at 1443.

\textsuperscript{137} See, e.g., Luna & Wade, supra note 122, at 1483–61; Thaman, supra note 6 at 339–42.

\textsuperscript{138} Bittmann, supra note 131, at 17.

\textsuperscript{139} STRAPROZESSORDnung [StPO] [CODE OF CRIMINAL PROCEDURE], § 407, translation at http://www.gesetze-im-internet.de/englisch_stpo/index.html#gl_p2364 (unofficial translation).

\textsuperscript{140} Thaman, supra note 4, at 18.

\textsuperscript{141} See, e.g., Id. at 18; Ma, supra note 126, at 37.

\textsuperscript{142} Vanessa J. Carduck, Qiao vadix, German Criminal Justice System? The Future of Plea Bargaining in Germany, WARWICK CRIM. JUST. CTR. 10, (2013).

\textsuperscript{143} Luna & Wade, supra note 122, at 1449.

\textsuperscript{144} Thaman, supra note 4, at 43–44.

\textsuperscript{145} Carduck, supra note 142, at 11.

\textsuperscript{146} Ma, supra note 126, at 35.
expedite the trial process especially in *flagrante delicto*. The French *correctionalisation*, where the prosecutor gets the authority to decrease the charge prior to filing it to the court,\(^{147}\) and Italian *patteggiamento*, which allows the prosecutor to dispose of the case with sole approval or rejection power of the court,\(^{148}\) are other types of this semi-discretionary procedures in civil law countries.

Notably, any of these procedures could be considered as possible models for Afghanistan. However, to the extent that this paper deals with the dissatisfaction of parties, which causes lengthy and costly trials resulting in overwhelming court dockets, a better solution would demand satisfaction between them; thus, negotiated agreements seem to have more to offer. Prior to discussing the essence these agreements as a solution, it is worth explaining why we chose the German process as an appropriate model. This lies in fundamental similarities between the criminal procedures in these two systems, which will be discussed in the following section.

### a. Similarities Between Criminal Procedure in Afghanistan and Germany

As mentioned, various civil law countries have trial avoidance procedures that could serve as models for Afghanistan. Law students consistently learn that Afghanistan follows the codification model followed by France; and in most discussions about legal institutions, France is usually deemed the very best model.\(^{149}\) Nonetheless, there are significant differences in criminal procedures of France (and some other civil law countries) and those of Afghanistan, differences that make it difficult to choose them as a potential model.\(^{150}\) For instance, France follows the expediency principle in criminal procedure and has investigative magistrates carrying out inquiries aside from the prosecutor’s investigations,\(^{151}\) none of which is followed by Afghanistan.

In contrast, Germany’s framework and principles of criminal procedure are much more compatible with those in Afghanistan. Considering the fact that full-blown comparisons between the criminal procedures of these two countries goes beyond the scope of discussion here, this next section attempts to illustrate the similarities that might affect the transplanation of negotiated agreements into the Afghan context.

\(^{147}\) Id at 32.


\(^{150}\) Id at 319–320.

\(^{151}\) [COUNCIL OF EUROPE, THE PARTICIPANTS IN TRIAL WITH PARTICULAR REFERENCE TO CRIMINAL PROCEDURE 59 (Strasbourg: Council of Eur. Pubs’g 1997).] [Appropriate citation]
5. Nullum Crimen Sine Lege (the Principle of Legality)

The very first similarity between these two countries can be found in their adherence to the principle of legality. In Germany, article 103 (2) of the Basic Law (Grundgesetz) and section 1 of the Penal Code (Strafgesetzbuch) asserts that no act can be punished unless clearly prohibited by the law prior to its perpetration.152 In the same way, Afghanistan has subscribed to the principle of legality.153 The Afghan Constitution and the Penal Code state that criminal acts should be asserted in the law and punishments should be declared prior to perpetration of the criminal act.154

While this principle appears to be simple and straightforward in its implication, this is not the case. The legality principle has several other ancillary minutiae. For example, in both Germany and Afghanistan, the principle of finding the material truth is one of these branches.155 In accordance with this principle, not only are investigative authorities obligated to submit all evidence they have gathered against and in favor of the accused, but also if the court finds the evidence doubtful, it can conduct further investigations, seek more evidence, and question the witness during the trial, among other actions.156

This principle, called the inquisitorial principle, places judges as the substantial truth finders.157 Article 244(2) of the StPO requires that “[i]n order to establish the truth, the court shall, proprio motu, extend the taking of evidence to all facts and means of proof relevant to the decision.”158 Likewise, article 155(2) of the StPO declares that courts are independent in their investigations.159 In Afghanistan, as is in Germany, this principle is one of the most fundamental principles of criminal procedure. Article 19 of the Law on the Organization of Courts asserts that courts satisfaction to all the
evidence submitted to it is necessary for the judgement it renders. 180 Similarly, Article 227 (2) of the Criminal Procedure Code obligates the court to consider and discuss all of the evidence submitted by the prosecutor, defendant, and other parties (litigants of civil remedy). 181 Ancillary to the legality principle in both countries is the mandatory prosecution principle. Article 152 (2) of the SPO provides that unless otherwise required by law, when "sufficient factual indications" exist, the prosecutor is "obligated to take action" against suspected criminals. 182 Likewise, although not clearly stated in the law, Afghanistan follows the mandatory prosecution principle as well. Article 171 of the Criminal Procedure Code provides instances where the prosecutor can refrain from filing the case to the court. 183 Argumentum a contrario, if the circumstances set forth by this article do not manifest, the prosecutor is obligated to file the case in the court. 184 By the same token, article 175 of the same code provides that if the prosecutor confirms the charge sheet prepared by the investigative prosecutor, he/she has to file the case. 185 That stated, both countries substantially limit the prosecutor's authority to withdraw from filing a charge against a defendant when sufficient evidence surfaces. 186 This is in contrast to some other civil law jurisdictions (as in France) that follow the immediacy principle, giving the prosecutor broader competence to dispose of cases prior to filing charges. 187

Germany and Afghanistan's procedures are also similar as to the prosecution's obligation to consider both incriminatory and exculpatory evidence during the proceedings. 188 In both countries, a prosecutor is

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162. SPO § 152(2).
163. CRIMINAL PROCEDURE CODE Kabul 1992 [2014] art 171 (g.f.).
164. SPO, ¶ 178; CRIM. PROC. CRIMINAL PROCEDURE CODE Kabul 1992 [2014] art 175 (a.f.).
165. Id. art 175.
166. SPO, § 178; CRIM. PROC. CRIMINAL PROCEDURE CODE Kabul 1992 [2014] art 175 (a.f.).
expected to act as a neutral party, rather than a hostile one, which is the more conventional role of prosecutors in the common law world. Article 160 (2) of the STPO obligates the public prosecutor to consider both “incriminating and exonerating circumstance” during the investigations. Similarly, the last sentence of Article 145 (3) of the Afghan Criminal Procedure Code requires prosecutors to collect evidence both in favor and against the defendant. This is the reason why “prosecutor,” Khamsi sharif, means “noble hostile” or “noble opponent” in Afghan criminal law literature.

6. Defendant’s Access to Dossier

A defendant’s right to have access to all files and documents prepared by the prosecution regarding defendant’s case is another shared aspect of the criminal procedure in both countries. This pretrial investigation’s document (dossier in Germany and dossiath in Afghanistan) is exposed to the broad scrutiny of the court and the defendant in both countries. Article 147 (1) of the STPO gives the defense counsel the authority to “inspect” the document submitted to the court and the evidence. Likewise, according to Articles 6 (5), 7 (11), 163 (2) of the Afghan Criminal Procedure Code, the defendant has the power to inquire the dossiath and be present during the examination of evidence and question witnesses in the investigation process. The existence of this right significantly matters to the defendant when an agreement is to be discussed.

7. Court Structure

Lastly, both countries follow the conventional civil law tradition of having two courts deciding facts, both the primary and the appellate, and a Supreme Court reviewing lower courts’ decisions on ground of error in law. STPO accepts appeals on fact and on law to high regional court, while appeal to the German Federal Court of Justice is admissible only on ground

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169. Boyne, supra note 134, at 1302.
170. STPO § 160(2).
171. CRIMINAL PROCEDURE CODE Kabul 1393 [2014] art. 145(3) (Afg.).
172. Id.
173. See JOHN H. LANOBEN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY 1, 8 (1977); CRIMINAL PROCEDURE CODE Kabul 1393 [2014] art. 17(1); STPO, § 147.
174. This article reads, “[d]efense counsel shall have authority to inspect those files which are available to the court or which will have to be submitted to the court if charges are preferred, as well as to inspect officially impounded pieces of evidence.” STPO, § 147.
175. CRIMINAL PROCEDURE CODE Kabul 1393 [2014] art. 6(5), 7(11), 163(2) (Afg.).
176. STPO, §§ 312, 333; CRIMINAL PROCEDURE CODE Kabul 1393 [2014] art. 175 (Afg.).
error in law. In Afghanistan, the Law on the Organization of Courts asserts that primary and appellate courts will consider cases according to their "nature, quality and content," and the Supreme Court ensures only that there has been no error in the application of the law. This means that parties can seek appellate remedies on factual grounds in the appellate courts, but the Supreme Court will accept the case only if parties contend that the lower court misapplied the law in a way that substantially affected the decision.

III. Abspreechen (NEGOTIATED AGREEMENTS): THE GERMAN MODEL

This part discusses the procedure of negotiated agreements in Germany, including how these agreements developed, the way they were finally formalized, the statutory and case law rules governing the agreements procedure, and other relevant sections of the German Code of Criminal Procedure (Strafprozessordnung, StPO).

A. History of the Negotiated Agreements in Germany

The fact that disposition of cases conflicts with the ex proprio motu obligation of courts belongs to ancient opinions in civil law countries. Nonetheless, civil law countries have recently left their strict adherence to the inquisitorial principle in favor of some consensual procedures in order to maintain procedural efficiency. Except for the Spanish conformidad, the first formal trend toward introduction of plea agreements in civil law countries started with the suggestion of the Council of Europe in 1987 and the introduction of Italian patteggiamento in 1988.

In Germany, practitioners started using informal agreements without any statutory or case law basis for it. However, its evolution is grateful to

175. SIPO §§ 312, 332.
177. CRIMINAL PROCEDURE CODE KAPU. 1393 (2014) art. 246, 247 (Afg.).
181. German law has used two terms that refer to proceedings covering these agreements. Exkrenzierung (meaning discussion) and Verhandlung (meaning negotiation). Abspreechen (meaning agreed) and negociated agreements are terms used to refer to the negociated outcome in the scholarly piece of both German and non-German writers. In this piece, in order to maintain the discussion throughout the piece and for the purposes of this piece's convergence with other articles, the term abspreechen and negociated agreements have been used. *Editor's Note: Author's personal knowledge.
182. Thaman, supra note 6, at 345.
183. See generally Fromm, supra note 148; Ma, supra note 126 (discussing recent change in continental Europe).
184. Thaman, supra note 6, at 31, 345-46.
185. Weigend & Tanne, supra note 155, at 97.
so-called judicial activism. Around the 1970s, Germany was deemed a "land without plea bargaining." Soon after, a German lawyer, who used the pseudonym Detlef Deal, published an article uncovering the behind the scene practices of informal agreements in Germany. Yet, the exact starting date of informal agreements in Germany is still unclear. In Germany, unlike some other civil law countries where this practice was started to deal with minor crimes, informal agreements were aimed at dealing with more complex and cumbersome cases such as white collar crimes; later, it was extended to drug crimes, financial crimes, tax evasion, environmental crimes, and so on as well.

The shift to using this procedure has been attributed to various factors, including the increase in the court docket and crimes overall, a shortage of judicial personnel, a change in substantive law while procedural laws had remained the same; changes in theories of punishment; changes in the relationship between the State and citizen; and prior changes and consensual elements as path pavers.

After this fact was revealed, practitioners not only did not deny practicing such agreements, but they also insisted on continued practice of these agreements for various reasons. Consequently, practitioners as proponents and academics as opponents began debating whether these agreements fit under the umbrella of the German criminal procedure principles. Nonetheless, the practice continued until 1987 when the constitutionality of these agreements was challenged in front of the German

186. See Carduck, supra note 142, at 4–5.
188. RAUXLOH, supra note 8, at 67.
191. Rauxloh, supra note 88, at 301.
192. MICHAEL BOHLANDER, PRINCIPLES OF GERMAN CRIMINAL PROCEDURE 120 (Hart Publ’g 2012).
194. Id. at 301–03.
196. In her article, Formalization of Plea Bargaining in Germany Will the New Legislation be Able to Square the Circle, Rauxloh asserts reasons posed by the practitioners. For instance, that the practice was not forbidden in the SYPO; that some sections of the SYPO allowed negotiations, namely 153a; that it handed over mutually acceptable outcome; and that the practice was "well established" were the most important arguments of the practitioners. Rauxloh, supra note 88, at 314–15.
197. See Frommann, supra note 148, at 201; Rauxloh, supra note 88, at 314; Weigend & Turner, supra note 135, at 81.
Federal Constitutional Court for the first time. There, the Court upheld the constitutionality of these agreements stating that as long as the law was respected, no constitutional right was impinged. Some of the early requirements asserted by this court concerned the principle of proportionality, thorough assessment of facts, and full consideration of the law and facts.

After the judgment of the constitutional court, some inconsistent judgments were made by different chambers of the German Federal Court of Justice during the 1990s. However, the Fourth chamber of German Federal Court of Justice in its landmark decision from 1997 sealed on the compatibility of these agreements with the principles of German criminal procedure. Besides accepting the practice, this Chamber ordained some restrictions on the practice. For instance, it prohibited charge bargaining and the waiver of the right to appeal, required informing all parties to the trial about the negotiations, prohibited offering a specific amount of punishment, among other measures. These limitations posed by the Fourth Chamber appear to have acted as important guidelines for courts for a long time. In 2005, the Grand Chamber of the German Federal Court of Justice was asked to once again reconsider whether these agreements could include the waiver of the right to appeal, and the Court held that the right to appeal could not be waived as part of the agreement. In addition, the Court asked the legislature to formalize the practice.

Following this suggestion, several drafts were presented by interest groups. In 2009, the legislature, by adding five new sections to the StPO and amending some others, for the first time accepted the practice of negotiated agreements. For these agreements, the legislature adopted the prior guidelines developed by the German Federal Court of Justice into the law. This was not the end of the opponents struggle though. In 2013, the constitutionality of the legislation permitting negotiated agreements was

198. Rau, supra note 88, at 316.
199. Id.
201. RAUL, supra note 8, at 68-72.
202. Id. at 71.
204. Rau, supra note 88, at 315.
205. Schemmel et al., supra note 16, at 45.
206. Fernández, supra note 146 at 20; Kernscher, supra note 11 at 42.
207. See, e.g., Cardaci, supra note 142, at 17; Kernscher, supra note 11, at 42.
208. Cardaci, supra note 142, at 8; RAUL, supra note 8, at 100.
challenged before the Federal Constitutional Court. Nonetheless, the Court held that despite the fact that there were certain deviations from the existing rules and restrictions on the practice, negotiated agreements, per se, were not unconstitutional.

Nonetheless, the controversy continues over the compatibility of these agreements with the principles of criminal procedure in Germany. 218

B. Negotiations, Agreements, and Procedure: Process of the Absprüchen

Generally, negotiations start during the preliminary investigations between prosecutor and the defendant, and they continue through the main hearings of the court where the actual negotiations take place. The process of the negotiated agreements in Germany can be divided into two stages, the preliminary stage and the final stage. 219 The preliminary stage starts from the investigation process and continues through the main hearing. 220 The final stage covers the period in which the court starts actual negotiations with the parties during the main hearing. 221

209. See Weigand & Tietze, supra note 135, at 61.

210. For in-depth discussion of German Federal Constitutional Court’s 2013 decision, see, e.g., Andreas M available, supra note 135, at 56-75 (2014); Weigand & Tietze, supra note 135, at 64-105; Schmitz et al., supra note 10, at 48-53.

211. It is worth noting that, unlike some writers’ use of the term plea bargaining, the plea bargaining notion is actually taken from the civil law context. In civil law countries, the line between the public law and private law has been drawn. Public law deals with the relations between private persons and the government, for example, tax law. Here, the government acts as the party of the public law, in contrast, deal with the relations between private persons, government is not part of the deal. One transaction can be the contract law, here, parties are under control over the subject matter of their contract, forgive the delinquent party.

In this criminal lit., one of the public law branches that deal with matters involving private person, the offender, on one side, and the government, prosecutor as its agent, on the other. Here, as the government is the party of the private persons, the prosecutor is not able to forgive the delinquent party.

The public interest requires punishing the offender. Therefore, a legal transaction, such as plea bargaining, which at least decreases the amount of punishment and at the most reduces criminal charges of the offender, can be acceptable in civil law tradition. Therefore, there exists no institution for plea bargaining in the German criminal law context. For further information see the following sources: Gilchrist, supra, at 62; Maling Lange, supra note 8, at 82; McClintock, supra note 8, at 82; McClintock, supra note 8, at 82.

211. LUSSKOR, supra note 8, at 72-73.

212. Compare XNNP § 160 (b), 2006 (c), 212, 257 (b), 297 (c).
1. Preliminary Stage

As mentioned above, preliminary discussions for agreements start during the investigation process. Section 160b asserts that

"The public prosecutor’s office may discuss the status of the proceedings with the participants, insofar as this appears suitable to expedite the proceedings. The essential content of this discussion shall be documented."  

This section clearly depicts the non-binding nature of the negotiation process during the preliminary investigations. The term discussion here indicates that the legislature did not intend to accord the prosecutor with the power to enter into an agreement. Participants in this article covers the defendant and in some cases the victim. Although the law itself is not clear on whether these negotiations will find their way to the court, the German Federal Court of Justice’s decision of 2011 confirms that every negotiation ought to be disclosed in front of the court.

This process raises several concerns and leaves several issues unanswered. First, it is not clear which party can initiate the discussion. It is unclear whether the defendant can start discussing the matter or whether he or she should wait for the prosecution. Second, there is no binding result stemming from these discussions, which, in addition to creating a missing chance of these discussions by the prosecution, makes the defendant reluctant to start the negotiation. Both of these concerns can lead to trivializing the agreement process in the investigation period. Third, it is not clear whether, when parties fail to reach an agreement, statements made in this discussion or evidence collected as the result of this discussion will be excluded as the fruits of the poisonous tree. Moreover, lack of directives in the investigation process compounds each of these concerns.

Likewise, this preliminary stage continues with its non-binding nature from the starting of the preparation for the hearing through the main hearing. Section 202a asserts, "where the court is considering the opening of main proceedings, it may discuss the status of the proceedings with the

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214. The German term used in this section is Forderungsmöglichkeit. *Editor’s Note: Author’s Personal Knowledge.
215. SUPER § 160b (emphasis added).
216. Bittmann, supra note 131, at 25.
217. Raschke, supra note 11, at 302.
218. See Rakchter, supra note 11, at 71.
220. Rakchter, supra note 11, at 63.
participants...[and]...[t]he essential content of this discussion shall be documented.\textsuperscript{221} Similarly, section 212 states that “s]ection 202a shall apply \textit{mutatis mutandis} after the opening of the main proceedings.\textsuperscript{222} These two sections, like section 160b, reiterate the non-binding nature of the negotiations, and there seem to be no significant change in the status of discussion during the preliminary hearings. Although section 243(4) requires the presiding judge of the main hearing to make sure whether there have been negotiations pursuant to sections 202a and 212,\textsuperscript{223} the Federal Court of Justice has ruled that these negotiations still have no binding effect.\textsuperscript{224} However, one promising change with respect to discussions pursuant to sections 202a and 212 is the Federal Court of Justice’s ruling indicating when section 243(4) applies, the deciding court shall consider the fact that who was the initiator of the discussions and which resolutions were given by parties.\textsuperscript{225} This precedent paves the first and final path for the defendant of initiating negotiations during the preliminary hearing in case he or she intends to enter into an agreement.

Section 257b also accords the court the authority to “discuss the status of the proceeding” with the “participants.”\textsuperscript{226} This section has a mere preparatory status,\textsuperscript{227} because the constitutional court has upheld the non-binding nature of the discussion under this section.\textsuperscript{228} Some scholars are of the opinion that this section has been inserted in the Code for the purpose of promoting open communication between the judge and the parties so that the later negotiations will run smoothly and the parties will be clear about the effect of the agreement; although they admit that due to restrictions posed by the German criminal procedure principles generally, it does not seem practically possible to discuss the outcomes of the agreements openly.\textsuperscript{229} This does not mean that there is not any informal way to discuss the outcomes, but it does mean that formally it is impossible. This is because, although the Federal Court of Justice allows discussion surrounding the penalty in the discussion under section 257b,\textsuperscript{230} section 257c (3) proves that, even during

\textsuperscript{221} SVPO § 202(a) (emphasis added).
\textsuperscript{222} SVPO § 212.
\textsuperscript{223} SVPO, § 243(4).
\textsuperscript{224} Bittmann, supra note 131, at 25.
\textsuperscript{225} Schemmel et. al., supra note 10, at 58.
\textsuperscript{226} SVPO § 257(b).
\textsuperscript{227} Kerscher, supra note 11, at 72.
\textsuperscript{228} Stefan Konig & Stefan Harrendorf, Negotiated Agreements and Open Communication in Criminal Trials: The Viewpoint of the Defense, 15 GER. L. J. 65, 77 (2014).
\textsuperscript{229} Id. at 69.
\textsuperscript{230} Bittmann, supra note 131, at 26.
the main negotiations, courts are not allowed to demonstrate the actual amount of the penalty.221

2. Final Stage

The second stage of the negotiations begins when the court, according to preliminary discussions, concludes that the case is suitable for negotiation and initiates the agreement process.222 As a matter of fact, this is the only stage in which the results will bind the parties to the negotiations when and if an agreement is reached.223 As mentioned above, section 257c of the StPO is the only section which comprises the most comprehensive part of the negotiated agreements' rules, and it is the central section to this Final stage. This section clearly asserts the process, the structure, and the boundaries of the negotiated agreements.

Its first subsection reads, "[i]n suitable cases the court may [according to subsequent subsections] reach an agreement224 with the participants on the further course and outcome of the proceedings."225 It adds, "Section 244 subsection (2) shall remain unaffected."226 This subsection clearly designates the court as the initiator of the negotiations.227 However, in practice, both the prosecution and the defendant can suggest initiating the negotiation process.228 The requirement that judges act as the initiator of negotiations, is due to the fact the legislature intended to adjust the negotiated agreements with the general principles of the German Criminal procedure.229 Whatever the purpose, this requirement creates a unidirectional initiation environment,230 which puts the main beneficiary of the agreement, namely the defendant, in a weaker position. Besides this conceptual flaw, other deficiencies of this section include its failure to define "suitable case."231 It should be cautioned that the word "participant" here only covers the prosecution and the defendant, not the victim.232 However, the victim can

221. StPO § 257c(3) stating the court may only offer the upper and lower limits, not the exact amounts.
222. Bitzmann, supra, note 131, at 52.
223. Id.
224. The German text used in this section is Verhandlungsgang.
225. StPO § 257c(3) (emphasis added).
226. Id.
227. Weigend & Turner, supra note 125, at 91.
228. Kuchen, supra note 11, at 57.
229. Cardock, supra note 142, at 19.
230. See Köng & Hermendorf, supra note 228, at 68.
231. Cardock, supra note 142, at 20.
232. BOHLANDER, supra note 192, at 120; StPO § 257c(3).
give his opinion on the agreement, which will not in any way obligate the court to comply.  

Giving private parties the power to compromise on the outcome of criminal proceedings would violate the inquisitorial aspects of the German criminal procedure. Thus, by stipulating that "section 244(2) remains unaffected," the legislature has affirmed that the negotiation process will not affect the substantial truth finding obligation of the court.  

Section 244(2) asserts that "[i]n order to establish the truth, the court shall, proprio motu, extend the taking of evidence to all facts and means of proof relevant to the decision," which is called the ex proprio motu investigation obligation of courts.  

On the judicial investigation duty of court in negotiated agreements, the German Federal Constitutional Court has asserted that if parties agreed upon facts that do not happen to be real, the conviction will be unconstitutional. Thus, this principle requires judges to independently examine all facts and circumstances of the case, which decrease the importance of the so-called slim confession.  

a. Contents of Negotiated Agreements

As to the contents of these agreements, section 257c (2) is of particular value. In addition to demonstrating permissible types and subject matters of negotiated agreements, it restricts bargaining on some specific issues. The restriction is mainly for the purposes of compliance with other procedural principles, namely the principle of guilt. This subsection reads:

The subject matter of this agreement may only comprise the legal consequences that could be the content of the judgment and of the associated rulings, other procedural measures relating to the course of the underlying adjudication proceedings, and the conduct of the participants during the trial. A confession shall be an integral part of any negotiated agreement. The verdict of guilt, as well as measures of reform and prevention, may not be the subject of a negotiated agreement.  


243. Bohlander, supra note 192, at 120.  
244. Altenhain, supra note 203, at 171–72.  
245. SYPO § 244(2).  
246. König & Harrendorf, supra note 228, at 73.  
247. See Weigend & Turner, supra note 135, at 91.  
248. See Rauxloh, supra note 88, at 321.  
249. SYPO § 257(c)(2).
The first sentence of this subsection clearly prohibits "charge bargaining" under SIPO. However, it should be cautioned that unlimited sentence bargaining is not permitted either. The German Federal Constitutional Court has ruled that unrestricted sentence bargaining is not permitted; shift in the sentence range must be compatible with the "wrongfulness" of the defendant.

This subsection is comprehensive in its other implications. It permits the court and parties to negotiate on punishment; some procedural requirements that relate to the main proceedings such as undertaking to pay the court costs, or indemnification payments, or waiving in request compensation; and other procedural measures such as release from custody. Other possible contents of the agreement are confiscation of property, early parole, and work release. It is worth mentioning that the Federal Constitutional Court has asserted that stipulating "underlying proceedings" in this section conveys that parties are not permitted to negotiate on other proceedings that do not relate to the main proceedings of the crime under negotiations. For instance, a prosecutor is not permitted to dismiss other pending charges in exchange for a defendant's confession.

In addition to the general exclusivity exception demonstrated by the German Federal Constitutional Court, other courts have also recognized some exceptions to the procedural contents of bargaining. It is impermissible to substitute financial penalty with custodial sentence. Moreover, parties to the negotiations are not permitted to agree on the delay of the proceedings because it violates due process. Finally, agreements on the extradition part of Section 456a are not allowed.

229. BEHLANDER, supra note 192 at 121; Bittmann, supra note 131, at 30.
230. KREUZ & HERMANN, supra note 228, at 73.
231. SCHMERMER et al., supra note 10, at 56.
232. RAASCH, supra note 88, at 310.
233. RAASCH, in her article—"Formalization of Plan Bargaining in Germany Will the New Legislature Be Able to Saber the Circle"—experts that another procedural measure was excluding the public from the trial. Since excluding the public from the trial is in permissible in certain cases is a public reason or reason given the public, indicated by law, and consent of the defendant is not part of them, in practice, courts exclude the public.
234. See SIPO § 456(a).
Under this subsection, one of the permissible contents of negotiated agreements, which might be slightly confusing as well, is the "conduct of the participants during the trial." Conduct of participants in this subsection stands for specific actions of the defendant concerning the evidence, for instance submitting motions to introduce new evidence or challenging the prosecutor's evidence. StPO authorizes the defendant to submit new evidence or suppress evidence introduced by the prosecution. Contrary to its conventional implication that the right to submit evidence benefits the defendant with introduction of evidence in his or her favor at any time during the trial, this principle has often been misused by defendants causing delay and complexity in some complicated cases. To solve this problem, the legislature accepts that courts can negotiate on the waiver of this right in exchange with concessions from the courts' side. The admissibility of the waiver of this right complies with the general principle that defendant can waive his right at any time except prohibited by law.

Confusion persists surrounding the inclusion of confession in negotiated agreements. Although the law asserts that "confession shall be an integral part of negotiated agreements," some agreements do not necessarily need a confession. For instance, in cases in which the defendant agrees to waive his or her right to submit new evidence, the defendant does not confess anything.

In addition, a confession cannot act as the versatile evidence in negotiated agreements; it should further be supported by concrete evidence. This notion has further been clarified by section 257c (2) stating that negotiations do not affect the substantial truth finding obligation of the court; "free appraisal of evidence principle" still governs as the basis of the court's decision. As to the evaluation method, the German Federal Constitutional Court clarified that judges can accomplish their duty to examine confession's conformity to the facts of the case in two ways,
Selbstausverfahren and Vorhalt. Selbstausverfahren, the “read-it-yourself process,” means that the responsible judge will independently study the dossier and assess the existing evidence and its reliability. In contrast, Vorhalt means that during the trial, judges can thoroughly examine defendant’s confession and statement by questioning him and confronting him with his prior statements. The latter method, in turn, is a safeguard to avoid false confessions of the defendant with the hope of sentence reductions.

Although there is disagreement over what affect the confession can have on mitigating the punishment, integrating the confessions can be viewed as serving two important purposes. First, since the mere notion of agreement implies consensus, there needs to be an indication that the defendant has accepted the agreement on his free will. Second, where courts carry the material truth finding burden, on the one hand, and the proceeding is summarized to an evidentiary hearing, on the other, confession gives the court a powerful tool to evaluate the reliability of the prosecutor’s evidence and the accuracy of the court’s conclusion. Meaning that, the court can get a chance to confirm the defendant’s confession and narration of the facts to the prosecutions assertion of the facts and evidence provided.

The last sentence of this subsection gives a more compelling part of the law. There, the legislature seeks to keep the public aspects of the offense out of the negotiations. This sentence excludes certain subject matters, namely the “verdict of guilt,” to the extent that the crime has disrupted the public order. It also excludes “measures of reform and prevention,” since there is fear of losing evidence, for example. Notably, restriction on these disciplinary and detention measures had not been addressed prior to the adoption of this section.

b. Sentence Consideration and Parties Role

Over the course of negotiations, courts are not allowed to promise a specific (amount of) sentence to the defendant in exchange for the...

274. Weigend & Turner, supra note 135, at 98.
275. Id.
276. Id.
277. Id.
278. Id.
279. Id.
280. Id.
281. Id.
282. Id.
283. See Schenscher et al., supra note 10, at 47.
agreement. Section 257c (3) states that “[t]he court shall announce [the agreement’s] content . . . [and] indicate an upper and lower sentence limit.” This flexibility of the sentence is aimed at its compliance with the circumstances and fact that may change during the evidentiary hearing. Moreover, judges should be obligated to consider due diligence as they would in normal proceedings. Emphasizing this point, the Federal Court of Justice states that this flexibility enables the courts to come up with a “described penalty range.”

A specific degree of concession concerning the sentence range has not been specified either by law or courts. Not specifying a general leniency range and case by case evaluation method serves two purposes. First, courts decide on sentence range considering certain circumstances; namely the defendant’s guilt, circumstances in favor and against him, and circumstances that are statutorily defined. These circumstances significantly differ from one case to another. Second, Section 267 (3) of StPO obligates the court to identify why the ordered sentence is appropriate. Added to this complexity is the proportionality requirement.

As discussed before, regarding section 160b, neither the prosecution nor the defendant are permitted to ask the court for a specific sentence before the main hearing is conducted. Section 257c (3) states that “[t]he participants shall be given the opportunity to make submissions,” after the court’s declaration of the higher and lower limits of the sentence. Parties can use this chance to submit their agreed-upon sentence range to the court in this stage; however, the court is not obligated to adopt it. The term “participants” in this section covers the defendant, not the victim.

284. STPO § 257c(2).
285. STPO § 257c(3).
286. See, e.g., BOLL, supra note 190, at 52; Bittmann, supra note 131, at 28.
287. Bittmann, supra note 131, at 28.
288. Id.
289. Kerscher, supra note 11, at 112.
290. This subsection in part reads: “The criminal judgment shall further specify in its reasons the penal norm which was applied and shall set out the circumstances which were decisive in assessing the penalty.” STPO § 160b(b).
291. See STPO § 267(3).
292. Id.
294. BOHLANDER, supra note 192, at 120 (citing to STPO § 257c(3)).
c. Conclusion of Negotiated Agreements

Negotiated agreements conclude at the end of the hearing before the judicial deliberation. The last sentence of section 257c (3) asserts that “[t]he negotiated agreement shall come into existence if the defendant and the public prosecution office agree to the court’s proposal.” This subsection renders parties’ acceptance an indispensable part of the conclusion, however, the manner for this acceptance is not expressly stated. Since Germany draws a clear line between public law and private law, parties are avoided to sign the proposal on grounds that criminal law is part of public law. In other words, if parties sign the proposal, it gets the status of a contract, which is a private law matter. It is worth mentioning here that the Federal Court of Justice has ruled that if the court fails to get the prosecutors agreement to its proposal, despite the fact that they are not bound by the proposal, the court is not prohibited to act as promised, insofar as it has reached this conclusion after a thorough examination of all facts of the case. It can be neither considered informal nor a so-called “gentleman’s agreement.”

d. Binding Effects of the Agreements

The Federal Court of Justice has ruled that only agreements resulting from the main trial and accordingly recorded will have affect, and that the binding effects of these agreements will not end unless by a “constitutive decision” of the court. It is not within the competence of the parties to the agreement to cease being bound by it. However, grounds exist based on which the party court can deviate from its promises. Asserting these grounds, section 257c (4) reads...
The court shall cease to be bound by a negotiated agreement if legal or factually significant circumstances have been overlooked or have arisen and the court therefore becomes convinced that the prospective sentencing range is no longer appropriate to the gravity of the offence or the degree of guilt. The same shall apply if the further conduct of the defendant at the trial does not correspond to that upon which the court’s prediction was based. The defendant’s confession may not be used in such cases. The court shall notify any deviation without delay.\(^{306}\)

The first sentence of this subsection suggests that if the court is convinced that the principle of proportionality is affected, it can break its previous promise. With respect to the second sentence, it is important to note that “conduct of the defendant” in this section does not refer to the defendant’s behavior in the court; rather it means that if the court and the defendant agree on defendant’s waiver of the right to submit new evidence or suppress prosecutor’s evidence, defendants’ disloyalty to this waiver will induce the court’s departure from its promise. However, giving this opportunity to the court may undermine the defendant’s trust in some cases.

As to the safeguards against the courts’ possible deviation, certain rules exist in StPO and also in courts’ opinions. First, there are safeguards for confessions made during the negotiations.\(^{307}\) The same subsection asserts that if the deciding court deviates from the agreement, “[t]he defendant’s confession may not be used” in subsequent proceedings.\(^{308}\) Fortifying this sentence, the German Federal Court of Justice has asserted that any other statement stemming from negotiations that constitutes the basis of the conviction is also subject to exclusion.\(^{309}\) Notably, these safeguards apply to inadmissible and “faulty” agreements mutatis mutandis.\(^{310}\)

Despite the fact that nullification of confession avoids possible misuse of these negotiations and enhances defendant’s trust, it seems unrealistic to assume that a confession once deemed credible will then be assumed null when new facts rise making the court more confident and the crime more serious.\(^{311}\) Besides this, another problem that carries a heavy weight of prejudice is the lack of safeguards against the judge who has served in these negotiations.\(^{312}\) Neither StPO nor courts mandate compulsory exclusion of

\(^{306}\) StPO § 257(c)(4).
\(^{307}\) Langbein, supra note 187, at 220.
\(^{308}\) StPO § 257(c)(4).
\(^{309}\) Bittmann, supra note 131, at 33.
\(^{310}\) Id.
\(^{311}\) Rauxloh, supra note 88, at 322.
\(^{312}\) Weigend & Turner, supra note 135, at 92.
these judges. However, the defendant can challenge the judge on the ground of bias under section 24(1). The duty of notification and instruction is another safeguard in the cases of deviation. The last sentence of the aforementioned subsection states that "[t]he court shall notify any deviation without delay." Likewise, section 257c(5) states that "[t]he defendant shall be instructed as to the prerequisites for and consequences of a deviation by the court from the prospective outcome pursuant to subsection (4)." The German Federal Court of Justice has ruled that these instructions to the defendant should be given prior to his decision concerning the court proposal. The instruction duty, besides ensuring defendant’s rights, is aimed at avoiding “utilization” of the agreement by the court. It also helps the defendant, in advance, to predict his or her conduct that could affect a court’s decision and the extent to which he or she should be cautious.

3. Procedural Requirements
a. Waiver of the Rights

The German Federal Court of Justice has withheld the waiver of the right to appeal as a component of negotiated agreements since 1997. Nonetheless, for a long period of time, the waiver constituted a large part of the agreements’ content. In 2009, in addition to formalizing the process, the legislature prohibited this waiver by amending Sections 35a and 302(1). Section 302(1) asserts that "[w]ithdrawal of an appellate remedy . . . takes effect before the expiration of [its] time limit, [but] if a negotiated agreement (Section 257c) has preceded the judgment, a waiver shall be excluded." Likewise, section 35a asserts that the defendant can

313. See id. at 91–92.
314. This section reads: "A judge may be challenged both when he has been barred by law from exercising judicial office and for fear of bias." Subsection 2 adds that "[a] challenge for fear of bias may be brought where there is reason to doubt the impartiality of a judge." See SIPPO § 24.
315. Id. § 257c(4).
316. Id. § 257c(5).
317. Bohlander, supra note 131, at 34.
318. Id.
319. Id.
320. Kesseler, supra note 11, at 41.
321. Bohlander, supra note 105, at 121.
322. Cardick, supra note 142, at 25.
323. SIPPO § 302(1).
always seek appellate remedy. This is also true for the prosecutor. According to the first sentence of §358(2), if an appellate court decides to revoke an agreement, the appellate court is bound by the upper limit of the sentence, which was proposed by the first instance court and accepted by the defendant in the course of negotiations. However, if the prosecutor appeals the sentence range, this restriction does not apply.

b. Duty to Record

StPO pays specific attention to the record duty of all officials involved in the negotiation process. Although all of the relating sections emphasize the duty of recording the negotiation process one way or the other, section 273 is the most significant in this regard. This section asserts that courts are obligated to record the course and the results of the negotiations in details. This subsection requires that even if no negotiation has taken place, the court would need to record this fact. If the court fails to record the agreement properly, or if the agreement was not included in the record, it will not bind any of the parties.

In the beginning of the main hearing, the presiding judge announces whether there has been any prior negotiation. Section 243(4) asserts this duty to disclosure of the prior negotiations. This section obligates the presiding judge to declare whether any negotiations have taken place before the main hearing, and to demonstrate the negotiations contents.

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324. The last sentence of this section reads: "Where a negotiated agreement (Section 257(c) has preceded a judgment, the person concerned shall also be informed that he is in any case free in his decision to seek an appellate remedy." Id.
325. Frommann, supra note 148, at 204; Bittmann, supra note 131 at 37.
326. StPO § 358(2).
327. Bittmann, supra note 131, at 37.
328. Id. at 38.
329. See StPO §§ 160(b), 202(a), 212, 257(b).
330. See id. §273(1)(a) stating, in pertinent part:

The record must also indicate, in essence, the course and content as well as the outcome of a negotiated agreement pursuant to Section 257(c). The same shall apply to the observance of the information and instruction requirements set out in Section 243 subsection (4), Section 257(c) subsection (4), fourth sentence, and Section 257 subsection (5). If no agreement was negotiated, this shall also be noted in the record.

331. Id.
332. BOHLANDER, supra note 192, at 122.
333. Kerscher, supra note 11, at 57.
334. See Weigend & Turner, supra note 135, at 95.
335. STPO § 243(4).
Considering this section, in the beginning of the main hearing, the presiding judge states if there have been any prior negotiations, and then it is entered into the record. In its 2013 decision, the German Constitutional Court also devoted a large part of its consideration to this issue. There, considering the factual data received from various research, one of the solutions that this court posed was its emphasis on the application of this section. They reasoned that this section is a complementary part of the “obligation of transparency and notification” embedded in 337(i) StPO. The Court also stated that all parts of the agreement are in “indispensable unity,” and even waiving the requirement of section 243 (4) leads to the abrogation of the agreement. The court also gave a broader interpretation of this subsection, and stated that it covers all of the content, for instance who initiated and which position was taken by whom. In practice, however, the judgment of the court does not cover all the details of the agreement, rather it states the outline of it and more detailed information can be found in the court record.

c. Additional Case Law

Another area of concern are the cases in which more than one defendant is involved. In these cases, fear of bias results from these negotiations, where one of the defendants enters into the agreement and the rest do not. Although statutory provisions are silent, the German Court of Justice has posed a simple solution, though not particularly helpful. The Court has emphasized that any negotiation with one defendant should be disclosed to the other parties (co-defendants). The court has also asserted that one defendant’s confession, in these cases, does not put the other(s) in pressure or coercion.

Finally, besides the discussed StPO rules, case law also adds some requirements to the agreement’s process. These requirements are as follows: all participants have to be informed, both parties should be present in the

336. Kretschmer, supra note 11, at 57.
337. See Weigand & Turner, supra note 135, at 81.
338. Midocher, supra note 210, at 11–12.
339. Id.
340. Id at 12.
341. Id at 11.
342. Kretschmer, supra note 11, at 57.
344. See Hittmann, supra note 131, at 26–27 (discussing conflict of interest).
345. Id at 27.
346. Id.
347. Schimitt et al., supra note 10, at 40; Russek, supra note 88, at 319.
court, the amount of the punishment has to conform to the degree of guilt, treats or undue promises are forbidden, package deals are prohibited, and agreements need to be included in the reasoned judgment of the court asserting the facts of the case.

IV. NEGOTIATED AGREEMENTS IN THE AFGHAN CONTEXT

This section introduces some changes that would be necessary for Afghanistan to adopt a system of negotiated agreements like Absprachen, and it anticipates some criticism that negotiated agreements might face. It also covers some challenges to the implementation of such agreements.

A. Necessary Changes

The sections above explained the procedure of German Absprachen which is significantly different from the United States plea bargaining institution. In fact, every legal institution established in a country carries a peculiar aspect of that country's legal system. Even when countries have similar legal systems, other social, political, cultural, or economic factors exist that significantly affect the way one institution functions in one country compared to others. Because of these variations and differences, transplantation of legal institutions usually requires some alterations in light of the context of the adopting country. Accordingly, Afghanistan cannot simply transplant Absprachen without making adjustments according to the Afghan context. This article's proposed changes attempt to harmonize German Absprachen with the legal system of Afghanistan, and tend to eliminate some of the inherent shortcomings of Absprachen, which exists despite its relative success in Germany.

348. See Weigend & Turner, supra note 135, at 88.
349. Schemmel et al., supra note 10, at 45.
350. Id.
351. Weigend & Turner, supra note 135, at 96.
352. Bittmann, supra note 131, at 36.
353. German Absprachen differs from United States plea bargaining. While pleas are meant to avoid further court proceedings in the United States, confession in the German system only shortens court proceedings. Similarly, unlike United States plea bargaining, Germany does not recognize pleas of solo contendere, where defendant refrains from admitting guilt, but waives the right to trial in exchange for a lenient sentence. Likewise, German judges have an ex proprio motu investigation duty that enables them to participate in the negotiation process and specify the terms of the agreement. In contrast, United States judges are excluded from the plea bargaining process, authorized only to review and approve or reject the agreement reached by the prosecutor and the defendant, but not to change the conditions. See, Erik Luna & Marianne Wrede, Prosecutorial Power: a Transnational Symposium: Prosecutor and Judges, 67 WASH. & LEE L. REV. 1413, 1433 (2010); SYPO § 302; TURNER, supra note 7, at 9–29, 30–37.
Prosecutor and Defendant Should Be Able to Initiate an Agreement

First, this paper recommends that Afghanistan strengthen involvement of the prosecutor and defendant in the agreement procedure. This empowerment could be achieved by a few additions to the agreement procedure. First, the prosecutor and the defendants’ roles should be enhanced during the investigation. Meaning that, unlike German Abstimmungen, negotiations conducted during the investigation phase should not be assumed as mere discussions. These negotiations should further as formal negotiations between the prosecutor and defendant, and they should be recorded thoroughly. Second, conflicting parties should also have the ability to reach an agreement. This agreement will be presented to the court as the parties’ proposal. Third, to enhance this capacity, the prosecutor and the defendant should be accorded the power to initiate negotiations in the court. This takes as to the general pattern of plea agreements where the defendant confesses and the court vows to show leniency.354

These changes, in addition to improving parties’ positions in the agreement procedure, assure parties of the outcome of the procedure; and they decrease the chances of mistrust by the defendant and misuse by the prosecution. Moreover, if courts appear to be the only initiators of negotiated agreements, there is a risk of coercion. Specifically, if the court proposes the agreement in the first place, the defendant might feel more pressure in favor of admission and risk more severe punishment if rejected.355 Further terms of how binding the prosecutor and defendant agreement should be, what subjects they can negotiate on, what the contents the proposal can have, how the parties can initiate the court negotiations, and some other necessary terms can be specified by the law.

354. In the United States, agreements reached by parties are deemed contracts. Civil law remedies, namely abrogation of the contract or seeking performance, apply if parties deviate from the contract. In contrast, agreements reached in Germany are embodied in court judgments, and they are treated as a matter of public law. The only remedy against a possible violation of Abstimmungen is the right to appeal. In addition, procedural rights subject to the waiver are broader in United States plea bargaining procedures compared to German Abstimmungen. Although certain procedural rights can be waived as the contents of the negotiations in the German system, waiver of the right to appeal is impossible under any circumstances. In the United States, however, a defendant can waive wider range of rights: right to appeal, the right to jury trial, the right to confront adverse witness, the right to representation in the plea hearing, and so on. See also Finley, R. G., supra note 3, § 1105.1 (2018). In contrast, In re: United States, 397 U.S. 742 (1970); North Carolina v. Allred, 460 U.S. 25 (1979); Samentile v. New York, 464 U.S. 260 (1977); United States v. Brown, 914 F.2d 532 (5th Cir. 1990); United States v. Brown, 718 F.2d 922, 925–926 (4th Cir. 1983); Turner v. United States, 396 U.S. 198 (1969); supra note 10, at 82–92; 10–37; Thomas Weisman, Should We Search for the Truth, and Who Should Do It? 36 N.C. J. INT’L L. & COM. R.R. 389, 395–97 (2013). (Rev.), supra note 196, at 3.

2. The Victim’s Participation in the Procedure Should Be Enhanced

Besides enhancing conflicting parties’ position in the agreement procedure, unlike the weak participation of the victim in * Absprachen.*, the victim’s role should also be strengthened in serious cases such as rape and sexual assault. Although every crime occurring against individuals harms the victim, in some cases the degree of these harms is more serious in both physical and psychological terms. Considering this fact, recent changes in codes aim at penalizing these acts with more severe punishment compared to their homological acts. For instance, the struggle to ratify the Elimination of Violation Against Women Act in Afghanistan is a better instance of the issue. To harmonize the plea agreement procedure with these trends and to ensure that the victim’s rights have not been impinged because of the compromise between the prosecutor and the defendant, the victim’s position in the plea agreement procedure should be improved during negotiation in the court. Besides this, one aspect of the victim participation in the agreement procedure can be the fact that it converges to the public interest and justice, as long as it can avoid unjustified agreements.

For this purpose, the victim can be accorded the opportunity to comment on the proposal, especially the amount of punishment. Additionally, the victim should be accorded the power to appeal the primary prosecutors’ decision to the appellate prosecutor. Likewise, this right can be further protected by the victims’ power to appeal the primary court’s decision to the appellate court subject to discretionary power of the appellate court. The reason behind this, according to the appellate court, is the discretion to accept or reject this appeal would be the fact that despite the seriousness of the harm to the victim, a criminal lawsuit is (still) society’s right. In fact, the victim’s power to influence the decision but not to negate it creates a balance between the severely impinged right of the individual and the right of the society to restore order. In addition, this approach would be compatible with principles of criminal procedure in Afghanistan as well. Certain similar rights have been accorded to victims throughout the Criminal Procedure

357. See id. at 101-02.
358. Kerscher, supra note 11, at 92.
359. We have similar rights for the victim in certain circumstances. For instance, article 170 of the Criminal Procedure Code gives the victim the right to appeal the primary prosecutor’s decision of issuing order not to file the case. This appeal will be file first to the higher prosecutor and the court if the higher prosecutor agreed to the order. Likewise, if the court issues the order not the further pursue the case, the victim can appeal to the appellate court. CRIMINAL PROCEDURE CODE, Kabul 1393 [2004] art. 203(2) (Afgh.).
360. Id.
Code, including the right to ask for disqualification of the prosecutor, the right to ask for disqualification of judges, the right to have access to the Dossier, the right to object prosecutor’s decision to dismiss the criminal case, and the right to object the primary court’s decision to dismiss the case.

3. More Safeguards Should be Added if the Agreement is Negated Later

Another important change would involve adding more safeguards in cases of possible deviation from the plea agreement. Although exclusion of the confession is one of the most important elements here (which applies in Abhörsachen as well), exclusion of the fruit of the poisonous tree could also function as a safeguard. In addition to excluding the confession of the defendant given in the course of negotiations, all of the related statements of the defendant (in and out of the court), and other evidence collected as the result of the confession or these agreements should also be excluded in subsequent procedures. Additionally, if the agreement is abrogated and the trial starts over, judges involved in the previous agreement should also be excluded from the subsequent trial. This rule is weak in German Abhörsachen, however. Proposed exclusionary rules, besides enhancing defendants’ trust, are aimed at decreasing the fear of bias and the overall unfairness of the subsequent trial.

4. If Some Co-defendants Negotiate and Others Do Not, Their Cases Should be Separated

While Abhörsachen lacks serious safeguards when cases involve multiple defendants, Afghanistan could decrease the fear of bias and ensure fair trials by separating co-defendants’ cases in which some of them enter into the negotiations and others do not. In fact, Afghanistan already has the legal authority to do this. For example, Article 155 (2) of the CPC

361. Id art. 35.
362. Id art. 173.
363. Id. art. 163 (2).
364. CRIMINAL PROCEDURE CODE, Kabul 1393 [2004] art. 179 (2) (Ar. 2).
365. Id. art. 205 (2).
366. Bittmann, supra note 131, at 37–38 (noting that some German courts have ruled that in the case of derogation a confession is admissible in the appellate court and the confession is only admissible in the court that reached the agreement).
367. See generally CRIMINAL PROCEDURE CODE, Kabul 1393 [2004] (Ar. 2).
articulates circumstances where the co-defendants' cases can be separated.\textsuperscript{369} While overall expedition of the proceedings is the main focus of this article, by adding one clause asserting separation of co-defendants' cases in negotiated agreements in this situation attains the purpose of fair trial.

5. The Degree of Sentence Deduction Should be Specified

To ensure sentence certainty,\textsuperscript{370} a common criticism of Absprachen,\textsuperscript{371} Afghanistan should specify the degree of sentence deduction in negotiated agreements. This specification would also help to reduce the risk of coercion,\textsuperscript{372} and it would eliminate the concept of "just is what is fair in bargains."\textsuperscript{373} This deduction can be a quarter or one-third of the punishment of the actual crime.\textsuperscript{374} To handle this issue, two approaches can solve the problem. First, the legislature can specify the amount of deduction within the act establishing negotiated agreements.\textsuperscript{375} This approach would ensure that the legality principle would not be undermined. Second, courts could be given the duty to specify a proper sentence deduction.\textsuperscript{376} In other words, case law could address this issue. The case law approach, besides having the benefit of flexibility, maintains the legality principle (as long as the law accords the duty of imposing just punishment after the full investigation of the case to the court).

6. Mandatory Representation Should be Required in Absprachen

Another necessary change would be the implementation of mandatory representation. In Absprachen, mandatory representation is not required unless the case appears in front of the Regional Court.\textsuperscript{377} The legislature should require mandatory representation in cases where a defendant agrees to enter into an agreement with a prosecutor. This mandatory representation could be required not only during the trial, but also during the investigation. To the extent that indigent defendants are the concern, the Afghan Constitution has already addressed the problem by requiring the assigned prosecutor and the court to introduce a legal representative to the indigent

\textsuperscript{369} Id. art. 155(2).
\textsuperscript{370} See Turner, supra note 355, at 207–10 (discussing risk of uncertainty).
\textsuperscript{371} Weigend & Turner, supra note 135, at 99.
\textsuperscript{372} Zara, supra note 211, at 10.
\textsuperscript{373} Boller, supra note 190, at 50.
\textsuperscript{374} Turner, supra note 355, at 207–10.
\textsuperscript{375} Id.
\textsuperscript{376} Id.
\textsuperscript{377} Kerscher, supra note 11, at 57.

60. Hadd and Qisas are Shaw'ia crimes. The definition of these crimes, their punishments, and ways to prove them are specified either by Holy Qur'an or Hadith (orders and sayings of Prophet Mohammad ‘Peace be Upon Him’). “Editor’s Note: Author’s Personal Knowledge.”

61. Article 161 of the Penal Code also states that the Penal Code only suits out non-Shaw'ia crimes (for instance, and the Shaw'ia crimes will be handled by the ‘Ulama’ (Islamic scholars) interpretation of Qur'an and Hadith). Quoted from [ Penal Code] art. 1 (Aq). Aq.


63. Id.

64. Article 161 of the Penal Code asserts that if the defendant is convicted of up to two years imprisonment or up to 2,000 Afghani, considering the character of the defendant and circumstances of the crime, the court can suspend imposition of the sentence for three years. This suspension is subject to revocation if the defendant commits another crime during those three years. Penal Code Kabbal 1355 [1976] art. 161–63 (Aq).

65. See Shahnaz et al., supra note 10, at 47.
B. Criticism

Similar to some of its civil law counterparts, the principle of prosecutor discretion to dispose of cases is unfamiliar to the Afghan legal community, and its introduction will inevitably face some criticism. This section anticipates some of these concerns and explains how they can be overcome.

1. Mandatory Prosecution Principle

Critics may argue that negotiated agreements undermine the principle of compulsory prosecution, a principle strictly followed by Afghanistan. However, adopting such an institution by no means implies that the prosecution can withdraw from filing charges; agreements are only aimed at bringing consensus between the prosecutor and the defendant (and to some extent the court) to expedite case proceedings. Contrary to the claim that negotiated agreements will diminish the mandatory prosecution principle, these agreements expedite the process of filing charges. In fact, these agreements provide the prosecutor with sufficient, reliable evidence that ensure the outcome of the trial – and for the prosecution, that is the conviction of the defendant. More importantly, the mandatory prosecution principle has not been adhered without exceptions in Afghanistan. Some exceptions to this principle exist. As mentioned before, article 171 (3) of the Criminal Procedure Code authorizes the prosecution to cease from filing a case if the "perpetrators culpability and the outcome of the crime is insignificant" and there is no public interest in pursuing that case. This exception implies the possibility of the adoption of some other exceptions, like negotiated agreements.

Further, criminal procedures of civil law countries are trending toward adopting efficient aspects of the immediacy principle rather than strictly adhering the mandatory prosecution principle. This trend could be due to the emergence of complex crimes such as various financial crimes and white-collar crimes, increase in the amount of crimes per se, and growth in population, on the one hand, and the shortage of investigative and adjudicative staff and the time consuming and costly nature of today’s trials, on the other. Thus, countries such as Germany, Italy, and The Netherlands have moved to adopt such expediting procedures. Furthermore, the main purpose of mandatory prosecution is to ensure that criminal activities are

386. See RAUXLOH, supra note 8, at 96–97.
387. See CRIMINAL PROCEDURE CODE, Kabul 1393 [2004] art. 171, 175 (Afg.).
388. Id. art. 171(3).
389. See Thaman, supra note 6, at 331–35.
390. See id. at 1–6 (discussing adding negotiations in Germany, Italy, and Netherlands).
properly handled, and that criminals are not able to circumvent punishment. Insofar as these goals are maintained with negotiated agreements, there is little cause to question them on this basis.

2. Risk of Coercion

Another concern about negotiated agreements is that they increase the risk of coercion in different ways, from “risk aversion” theory of Turner, to torture, to undue promises and warning imposition of harsh punishments. This concern is also not valid as long as there are certain safeguards ensuring fairness of the process. The first safeguard here is the legality principle, limiting prosecutors’ authority in specifying the amount of punishment. Likewise, several bulwarks exist against the use of coercion during the investigation, for instance inadmissibility of evidence collected under coercion. Moreover, the *ex proprio motu* investigation obligation of the court is another significant safeguard. Judges involvement, *per se*, has its positive effect on what the prosecutor thinks he will face later during the trial.

Furthermore, unlike common law plea bargaining where a prosecutor is a “Jack of all trades” with no duty to consider exonerating evidence, under article 145(3) of the Afghan Criminal Procedure Code, a prosecutor is obligated to consider both exculpatory and incriminating evidence during the investigation. This obligation in turn dramatically decreases the risk of coercion since the aim of prosecution is not to convict, but rather to reach the truth. Finally, the defendant’s right to have access to the dossier and be present during the examination of evidence and even question witnesses also plays its part in decreasing the risk of coercion. This right is further enhanced with the legal representation of the defendant. Even for indigent defendants, prosecutor and courts are obligated to introduce a public defender.

To the extent that the judges’ dominance might be a concern, a well-articulated decision of the German Constitutional Court solves this problem. This court has accorded the prosecution the role of “guardians of law” in a

391. See Turner, supra note 335, at 201 (explaining “risk aversion theory”).
392. CRIMINAL PROCEDURE CODE, Kebd 1923 [2004] art. 21, 22, 190(3) (Arz.).
393. See Turner, supra note 335, at 212-13 (“Reexamining Judicial Involvement in Plea Bargaining”).
394. See id. at 206-06 (discussing the analysis of risk of coercion).
395. Id. at 266 (reading “[T]he prosecutor shall collect and analyze both incriminating and exculpatory evidence equally.”).
396. Id. at 246.
sense that they will avoid entering into an illegal agreement.\textsuperscript{398} Meaning that, the obligation of courts to investigate \textit{ex proprio motu} and the obligation of prosecution to ensure application of the law creates an inter-correlated system of checks and balances.\textsuperscript{399} This in turn ensures the fairness of the process and leads to a just result.

3. Supplanting the Court

One of the concerns regarding the agreements is that they supplant the court.\textsuperscript{400} While it might be true about some procedures such as French \textit{Comparution sur reconnaissance préalable de culpabilité} presented by Hodgsdon,\textsuperscript{401} it is not an accurate concern about negotiated agreements where courts still retain significant power in determining the outcome of the trial.\textsuperscript{402} As note 282 clarifies, the distinction between United States plea bargaining and \textit{Absprachen}, there are significant differences between these two institutions.\textsuperscript{403} Considering the trial avoidance nature of the United States plea bargaining and the fact that a vast majority (almost ninety-five percent) of cases is solved by guilty pleas, this concern is of significant importance.\textsuperscript{404} In contrast, the fact that courts still retain significant amount of discretion (and that is assuring the accusation is accurate and the punishment ascertained) in the negotiated agreements proposal diminishes the concern of courts being supplanted.

4. Presumption of Innocence and the Privilege Against Self Incrimination

The concern that negotiated agreements undermine the presumption of innocence\textsuperscript{405} and the privilege against self-incrimination, thus questioning the fairness of the trial seems valid to the extent that a trial begins with the assumption of defendant’s guilt.\textsuperscript{406} This fact, in turn, may affect the judgment of the court. However, to the extent that maintaining presumption

\textsuperscript{398} Weinfeld & Turner, supra note 135, at 96.
\textsuperscript{399} See, StPO § 244; SHAWN MARIE BOYNE, THE GERMAN PROSECUTION SERVICE: GUARDIANS OF THE LAW? 94 (2013).
\textsuperscript{401} Id.
\textsuperscript{402} Id.
\textsuperscript{403} Tharman, supra note 4, at 430.
\textsuperscript{404} Id. at 19.
\textsuperscript{405} Carduck, supra note 142, at 15.
\textsuperscript{406} See RAUXLOH, supra note 8, at 95–96.
of innocence relates to judges, plea agreements will not impair the presumption of innocence inasmuch as the determining factor during trial is not the agreement between the prosecutor and the defendant, but the obligation of the court to investigate ex proprio motu.\textsuperscript{406} Second, Article 23 of the Criminal Procedure Code obligates the court to evaluate both incriminating and exonerating evidence and base its judgment on the “strength and weaknesses” of the evidence provided.\textsuperscript{407} Article 129 of the Constitution and Article 12 of the Law on the Organization of Courts assert that the court has to give reasons for its judgment.\textsuperscript{408} These articles ensure that judges cannot issue judgments based on weak evidence corroborated by the presumption of guilt or their own assumptions.

Regarding the right against self-incrimination, it is worth noting that the right to be silent is a procedural right and is always subject to a waiver.\textsuperscript{409} At any trial, the defendant is able to waive this procedural right and confess commission of the alleged crime.\textsuperscript{410} To retain waiving any right is under the full discretion of the defendant. Article 156 of the Criminal Procedure Code asserts that the prosecutor may ask the suspect regarding the crime and that the defendant can choose to remain silent or to give a statement.\textsuperscript{411} In negotiated agreements, similar to the conventional trials where the defendant waives this right by confessing the alleged crime, the defendant does nothing but waives his right to be silent.\textsuperscript{412} Furthermore, this right is basically aimed at limiting the prosecutor’s authority to forcefully call up defendant’s confession. In other words, this right is a safeguard to the misuse of power by the prosecution and an elimination of the torture in invoking confession. Keeping this in mind, the defendant’s willful confession in negotiated agreements does not affect the validity of the right against self-incrimination.

\textsuperscript{406} Waigand & Turner, supra note 135, at 33.
\textsuperscript{407} CRIMINAL PROCEDURE CODE, Kabul 1993 [2004] art. 23 (Afg.).
\textsuperscript{409} See Waigand & Turner, supra note 135 [2004] art. 8 (Afg.).
\textsuperscript{410} Waigand & Turner, supra note 135, at 84.
\textsuperscript{411} CRIMINAL PROCEDURE CODE, Kabul 1993 [2004] art. 156 (Afg.).

The prosecutor is obligated to ask the suspect in the beginning to state his/her role in the crime. If the defendant continues to make statements of the crime or to part of it, or provide information with respect to the issue, the prosecutor shall request his/her to provide further details as to how the criminal action was committed.

\textsuperscript{412} See Rascal, supra note 31, at 101.
5. Fairness of the Trial and Confession

Others may express concern that abbreviated trials may raise the risk of unfair judgments; however, it should not be expected that in full-blown trials, there will always be "more truth" and "more justice" compared to expedited ones.414 Courts can perform their obligation to search the material truth as long as they take all of the important evidence; it is not necessary for the court to take all the evidence related to the case.415 It should be noted that the confinement to just taking important and material evidence in these cases does free the court from considering exculpatory evidence.416

Finally, there would likely be concerns about the role of confession in negotiated agreements. Confession has historically been deemed as a punishment mitigating factor.417 However, the reasons may differ from indicating that the defendant is remorseful to the fact that it quenches the victim's emotions in certain cases. Considering that the general purpose of punishment is deterrence beside compensation (and rather than retribution), confession is a good indicator of the fact that the defendant will not commit any crime again inasmuch as confession indicates defendant's remorse which is crucial to deterrence.418 However, some scholars doubt whether a defendant's confession in negotiated agreements will reflect his or her actual remorse.419 Others believe that based on the principle of in dubio pro reo, we cannot completely waive the impact of remorse.420 Others, such as Regina, referring to what Widmaier calls the "ethical effort" state that the moral attempt of the defendant to challenge his or her instinct not to blame him/herself publicly should be appreciated as a mitigating factor.421

Another concern about negotiated agreements is that if parties cease being bound by the agreement, the confession cannot be neutralized in spite of its annulment.422 Despite the philosophical credibility of this concern, several practical safeguards exist that mitigate the effects of such a confession. Specifically, once the primary courts' proceedings start over, the facts that the panel of judges should differ from that involved in the

414. Thaman, supra note 4, at 11.
415. Kerscher, supra note 11, at 44.
416. Id.
417. Thaman, supra note 4, at 41.
418. See Boli, supra note 190, at 40.
419. Carduck, supra note 126, at 14.
420. ROUXLIE, supra note 8, at 77.
421. Id.
422. Id.
agreement process, and that the prosecutor needs to submit a new indictment have their effects.\textsuperscript{423}

C. Potential Challenges to the Application of Negotiated Agreements in Afghanistan

One of the greatest barriers to the establishment of negotiated agreements in Afghanistan will be the persistent and widespread corruption in the country. In the 2013 Transparency International’s Corruption Index, Afghanistan ranked 175 out of 177 countries; and later in 2014, it ranked 172 out of 175.\textsuperscript{424} As for the judicial system, corruption is one of the primary causes of judicial distrust, and as a result many citizens turn to informal justice mechanisms to handle their disputes.\textsuperscript{425} Despite some changes in the salaries of court officials, the situation has not changed much in recent years. Asking for bribes in both rural and urban areas is one of the most shameful characteristics of the prosecution and courts.\textsuperscript{426} Most of the time, judges and prosecutors in these areas ask for bribes. Widespread corruption indeed can impair the main purpose of the negotiated agreements’ establishment in two ways. First, in a system where pervasive corruption, namely bribery, is the norm, there is no doubt that these agreements will submit a propitious tool to boosting bribery business of prosecutors and judges. Misuses of power, intimidation, and unlawful detention and custodies become inevitable in such a system.

Second, corruption is also likely to be used in favor of some defendants in an unlawful manner. In a corrupt system, legal institutions widening the space and opportunity to bribe an official are in favor of the defendant because defendants can easily mitigate their punishment. While bribing the prosecutor to ask for lower punishment carries the risk of being refused by the court, and paying both entities is expensive, a well-articulated agreement between the prosecutor and the defendant along with the court’s serious enthusiasm towards expedited case adjudication are favorable to everyone in the scene.

Another important challenge to the application of negotiated agreements is the so-called “court elite” constitution and the anti-defendant

\textsuperscript{423} Id.


\textsuperscript{426} Kira Danisz, Note, Obstacles to Accessing the State Justice System in Rural Afghanistan, 18 IND. J. GLOBAL LEGAL STUD. 929, 945 (2011).
mentality of judges. Although sufficient research on this issue is not currently available, there is a prosecutor-judge friendship in the judicial system of Afghanistan. This prosecution favoritism by judges is accompanied by a negative mentality against defendants. And in many cases, defendants brought to the court are deemed guilty. This fact is evident in Afghanistan’s high conviction rates. In the last twelve months, the conviction rate in primary court was approximately 80%, and this rate was nearly 83% in appellate courts (see infra part II, section (b), “the Judiciary report”, paragraph four) When judges are asked about these high conviction rates, they consistently state that suspects would not be in court unless they had done something wrong. This mentality can affect negotiated agreements because of the ex proprio motu investigation obligation of courts. Based on this mentality, unexpected results can ensue according judges with the competence to summarize the procedure, especially taking of evidence, especially when defendants tend to wrap up the conviction as soon as possible.

While these are serious concerns, they should not prevent Afghanistan from developing its criminal procedure. They would not affect negotiated agreements any more than they already affect other aspect of the judicial system of Afghanistan, so they should not be viewed as a barrier to implementation of these agreements. Instead of avoiding implementation of negotiated agreements, the government should focus its efforts on fighting these problems. This article does not attempt to propose any specific recommendation as to how to deal with the aforementioned problems since that topic falls outside of the narrow topic of negotiated agreements and requires a whole set of new research. Nevertheless, this paper emphasizes that the overall anti-corruption policies should be taken seriously and corrupt officials should be brought to justice. Specific emphasis should be paid to the ethical and religious responsibilities of judges.

One effective measure, specifically with respect to corruption, could include requiring asset and income disclosure of members of the judiciary. These forms should be returned on time, scrutinized seriously, and violators should be subject to enforcement and consequences. In addition, with respect to the second problem, special seminars and conferences could be held for judicial sector actors emphasizing on the judges and prosecutors’ duty to implement justice. These conferences could stress that prosecutors are obligated to find the truth over seeking a defendants’ conviction; similarly, judges are supposed to be third party neutrals whose job is to make sure that the crimes has actually happened and find the perpetrator’s culpability rather than supporting the prosecution. These principles can and should be maintained.

427. Most of the data presented in this section has come from the author’s practical work as a defense attorney in Afghanistan since 2012.
emphasized in law schools, special training programs conducted by these schools and the Judiciary Stage.

While according to recent data, the overall illiteracy rate in Afghanistan remains just under fifty percent, the situation is not much different in the judiciary as studies of the judicial sector in 2007 indicated that one-third of judges lacked higher education. This has neither changed a lot nor is different among prosecutors. Such unprofessionalism among judges and prosecutors can harm the integrity of negotiated agreements in the same manner as it has affected the judicial system as a whole. Court actors’ incompetence in utilizing negotiated agreements can paralyze the efficiency of these agreements generally. This problem appears to be more severe especially in the first period of institutionalizing negotiated agreements in Afghanistan. One way, however, to reduce this risk is to conduct training programs on negotiated agreements for judges, prosecutors, and defense attorneys. The Afghanistan Independent Bar Association and other NGOs that are active in the judicial sector are vital for advocating negotiated agreements and educating defense attorneys.

D. Institutionalizing Negotiated Agreements in Afghanistan

Defects of the new Criminal Procedure Code of Afghanistan seem to make its amendment inevitable. Interestingly, this Code was amended right after its ratification by the Parliament and before the President signed it. Court actors are continually attacking this Code for lack of some provisions that existed in previous criminal procedure codes. Despite these attacks, and despite the fact that court actors repeatedly request amendments to the code, no action has been taken. This inaction might be explained by the attitudes of the Ministry of Justice, where its members may feel reluctant to tamper with the new law, especially if doing so suggests unprofessionalism of its staff. Despite this reluctance, the code cannot continue to function without amendment.

This paper proposes that during the course of amending the Code, the Ministry of Justice should consider incorporating negotiated agreements into the Code as a solution to the current situation of the prolonged and costly trials. The Ministry of Justice can either create a new section for negotiated

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421. See supra note at 957.
agreements, laying out its procedures, or it can duplicate the German law structure by entering specific rules about negotiated agreements under each chapter of the law. For instance, rules relating to the investigation stage could be incorporated under the chapter on investigations, and rules relating to primary court proceedings will be entered under the primary court chapter, and so on.

The previous structure of putting all rules under one chapter has the benefit that rules can be easily found, especially when agreements are on the table. In contrast, the second way enables a more contextualized practice, where rules for these agreements fall under the specific chapter that regulates the legal actions of that specific actor. Moreover, the second way seems more helpful for adapting these agreements to the normal proceedings. Furthermore, creating a new section may create a sense of separation between these agreements and normal proceedings, and this detachment could be harmful to the success of negotiated agreements.

In addition to incorporating negotiated agreements into the law, another important issue is the awareness of current judges, prosecutors, and defense attorneys. This article recommends more training programs, seminars, and conferences, which will be needed to educate these court actors about these agreements. The Ministry of Justice, The Supreme Court, and NGO’s working on rule of law and justice reform in Afghanistan can take the initiative of educating court actors. In addition, the Afghanistan Independent Bar Association (“AIBA”) can conduct training programs for lawyers and its defense attorneys. It can also include teaching the process of these agreements in its one year defense attorney skills course, a course which every defense attorney newly submitted to the AIBA has to go through. Likewise, the Attorney General Office can also conduct trainings and include these agreements in the one-year prosecutorial skills course taken by any newly submitted prosecutor. The Supreme Court, of course, is in a better position in institutionalizing negotiated agreements. In addition to conducting training programs, conferences, and seminars to judges, this Court can include teaching negotiated agreements in the Judiciary Stage.

In addition to these directly related institutions, law schools are other institutions that can achieve an important role in the institutionalization of negotiated agreements. Law schools may be the best institutions to work on further development of negotiated agreements in Afghanistan. Incorporating negotiated agreements in the syllabi of law schools paves the way to more research on the pros and cons of these agreements by both professors and students. This research will further encourage the newly born institution to adapt to the unique aspects of Afghanistan’s legal culture.
E. Institutionalizing Abbeurachen in Other Post-Conflict, Civil Law Countries

Other post conflict, civil law countries can also benefit from establishing negotiated agreements. Countries intending to address their court dockets and trials length by adopting Abbeurachen will need to go through the same processes that this article recommends for Afghanistan. Certainly, the country will first need to examine whether the establishment of such an institution is compatible with its constitutional and statutory procedural requirements. If such compromise does not exist, the country will first need to accommodate necessary changes in its procedural requirements, paving the way to the adoption of Abbeurachen. Additionally, in civil law countries where the principle of prosecutorial discretion is rarely known, according prosecutors and courts with the power to dispose of cases in compromise with the defendants can result in many unexpected consequences. For this reason, any country adopting negotiated agreements will need to ensure the existence of necessary safeguards protecting defendants’ rights against possible misuses of power by court actors. For instance, if the court ceases to apply the agreement, defendants’ right to ask recusal of judges who were part of the agreement must be protected in subsequent proceedings.

Likewise, the host country will also need to bring necessary changes to Abbeurachen in order to make the agreements compatible with its general and indispensable procedural principles and the legal culture of the country. Neither the exact German Abbeurachen nor the model proposed by this article can be fully compatible with the legal culture of other countries interested in adopting negotiated agreements, regardless of the supposed close similarity between procedural rules of both countries. Arguably, because other factors exist that directly or indirectly affect the legal culture and the legal institutions of each country differently. The existence of such differences will necessitate certain changes in Abbeurachen in order to make it possible for the new institution to adapt to the legal culture of the host country. Finally, the host country will also need to take necessary steps to institutionalize the new institution in its legal culture and criminal procedure. As recommended to Afghanistan, certain institutions will need to take the initiative of educating and informing court actors and interest groups about the nature, processes, benefits, and necessity of having ease disposing procedures such as Abbeurachen.

V. CONCLUSION

Eliminating dissatisfaction of parties with trial outcomes invokes bringing party consensus to the decisions of courts, which will lead us to a considerable reduced trial length. German practitioners designed
Absprachen to deal with this issue. While Germany strictly adheres to the compulsory prosecution principle, recent changes, namely the concept of efficiency, led the country to adopt significant changes to its procedure, especially as to prosecutorial discretion.\textsuperscript{432} One of these changes is the formalization of Absprachen. Considering the inquisitorial nature of the German criminal procedure, this institution actually resembles a summary trial where the evidentiary hearing and finding material truth stems from the \textit{ex proprio motu} examination of the facts, the so-called judicial investigation obligation.\textsuperscript{433} However, parties still maintain a degree of control over the outcomes of the trial.\textsuperscript{434} In fact, the role of judges in such a procedure can be summarized to a party and a supervisor to negotiations.\textsuperscript{435}

Given the success of these negotiated agreements in Germany and other civil law countries that use them, this article suggests that Afghanistan and other post-conflict civil law countries may benefit from establishing a similar institution to address their problems with overloaded court dockets. Because of the lack of case disposing procedures, managing caseloads is one of the primary tensions of judges and prosecutors in these countries. In fact, the mandatory prosecution principle and the inquisitorial nature of these countries' criminal procedure prevent according the prosecutors with a wide clearance power, namely autonomous case disposing of authority. An autonomous authority of case disposal.\textsuperscript{436} Establishment of negotiated agreements will eliminate these concerns insofar as it maintains both of these opposing benefits. Additionally, these agreements have the benefit of incorporating party consensus to the trial outcomes, thus significantly lessening the amount of appeals.

In addition, these agreements can help the prosecution with rapid filling of cases and eliminating the waste of time on less significant side issues. Similarly, primary courts will also benefit as long as a full-blown trial will be substituted with a brief evidentiary hearing, thus saving the time spent on other non-conflicting issues. This summary procedure does not mean infringing individuals' rights or putting them into pressure. On the contrary, a defendant who knows through obvious evidence and "competent advice" that he will be convicted will definitely seek short proceedings\textsuperscript{437} in exchange of a more lenient punishment.

\textsuperscript{432} Frommann, supra note 148, at 199.

\textsuperscript{433} Mosbacher, supra note 210, at 7.

\textsuperscript{434} Id.

\textsuperscript{435} Turner, supra note 7, at 221.


\textsuperscript{437} Bittmann, supra note 131, at 18.
Admittedly, as one commenter articulates, these agreements are not "panacea" to all the problems of criminal law and "burgeoning" court dockets in any country; regardless, they undeniably address the issue of parties’ dissatisfaction and result in efficient case disposing procedures. Negotiated agreements will not create a parallel structure or supplant the criminal adjudication competence of courts; rather, they will streamline criminal processes and create consensus to avoid further unnecessary proceedings and expenses for both the government and individuals.